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June 2 93  
REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

# COURT OF APPEALS

OF KENTUCKY.

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VOLUME III.

T. L. EDELEN, REPORTER.

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VOLUME 106, KENTUCKY REPORTS,  
CONTAINING CASES DECIDED FROM MARCH 4, 1899, TO JUNE 17, 1899.

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# TABLE OF CASES REPORTED.

Abner, &c., ads. Creech, &c. ....	239
Adams' Admr. ads. L. & N. R. R. Co. ....	859
Aetna Insurance Company, &c., v. Commonwealth ....	864
Ahrens & Ott Mfg. Co. v. Hoeher ....	692
Aitken, Son & Co. v. Lang's Admr., &c. ....	652
Allen ads. Spratt ....	274
Allison, &c., v. Cocke's Exr., &c. ....	763
Allison, &c., v. Preston's Exr., &c. ....	763
Anderson, &c., ads. Louisville Banking Co. ....	744
Armstrong v. Brown ....	81
Ashland & Catlettsburg St. Ry. Co. v. Faulkner ....	332
Atchison v. Atchison ....	190
Babbitt, &c., ads. Saunders' Admr., &c. ....	646
Bailey v. Figely ....	725
Baker v. Commonwealth ....	212
Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c. ....	395
Barbour's Admr. v. Larue's Assignee, &c. ....	546
Barnett ads. Gleason ....	125
Bell & Coggeshall Company v. Kentucky Glass Works ....	7
Benge's Admr. v. Bowling, &c. ....	575
Bittner, &c., ads. Morehead's Admr. ....	523
Board of Council of Danville v. Fiscal Court of Boyle County....	608
Bowling, &c., ads. Benge's Admr. ....	575
Brand ads. Jones, &c. ....	410
Brantley's Admr. ads. L. & N. R. R. Co. ....	849
Breathitt Coal, Iron & Lumber Co., The, v. Strong, &c. ....	699
Brey ads. Monarch ....	688
Bridges, &c. v. McAllister ....	791
Bright, &c., v. First National Bank, &c. ....	702
Bright's Exrs. v. Swinebroad, &c. ....	737
Brown ads. Armstrong ....	81
Caldwell ads. Ryan ....	543
Carl, &c., ads. Hughes ....	533
Central Railway & Bridge Co., &c., v. Commonwealth ....	329
Chesapeake & Ohio Railway Co. v. Judd's Admx. ....	364
Clark, &c., ads. Wright, &c. ....	81
Clay City National Bank v. Conlee ....	788
Cocke's Exor., &c., ads. Allison, &c. ....	763

Cockrell's Recr ads. New Farmers Bank, Trustee—First Nat. Bank.

Cockrell's Recr. ads. New Farmers Bank, Trustee .....	578
Commercial Bldg. Trust's Assignee, &c., ads. Sumrall, &c.....	260
Commonwealth ads. Aetna Insurance Company .....	864
Commonwealth ads. Baker .....	212
Commonwealth ads. Central Railway & Bridge Co., &c. ....	329
Commonwealth ads. Cooper .....	909
Commonwealth ads. Gibson .....	360
Commonwealth ads. Gilbert .....	919
Commonwealth ads. Hall .....	894
Commonwealth v. Haly, &c. ....	716
Commonwealth ads. Louisville Tobacco Warehouse Co. ....	165
Commonwealth ads. L. & N. R. R. Co. (long and short haul) ..	633
Commonwealth ads. Mitchell .....	602
Commonwealth ads. Newport, City of .....	434
Commonwealth ads. Reynolds .....	37
Commonwealth ads. Wade .....	321
Conlee ads. Clay City National Bank .....	788
Cook v. Union Trust Co., &c. ....	803
Cooksey, &c., v. Hill, &c. ....	297
Cooper v. Commonwealth .....	909
Cooper v. Wait, Treasurer .....	628
Creech, &c., v. Abner, &c. ....	239
Creighton, &c., ads. L. & N. R. R. Co. ....	42
Crunden-Martin Woodenware Co. ads. Fairmount Glass Works..	659
Cunningham's Admr., &c., v. Speagle .....	278
Denton ads. People's Bldg. & Savings Assn. ....	186
District of Clifton, Campbell County, v. Schneider .....	605
Donnelly, Tax Collector, ads. Latonia Agricultural & Stock Assn.	325
Dotson ads. Tilford, &c. ....	755
Dunn ads. Mutual Benefit Life Ins. Co. of Newark .....	591
East Tennessee Telephone Co., &c., v. City of Russellville.....	667
Ecklar ads. Safety Building & Loan Assn. ....	115
Eubank, Assignee, &c., ads. Forwood .....	291
Eversole's Admr., &c., ads. Stix, &c. ....	516
Fairmount Glass Works v. Crunden-Martin Woodenware Co.....	659
Farmers' Mutual Aid Assn., of Mason County, ads. Rogers.....	371
Farmers' & Traders' Bank ads. Monarch Co., M. V.....	206
Faulkner ads. Ashland & Catlettsburg St. Ry. Co. ....	332
Fidelity & Casualty Co. v. City of Louisville, &c. ....	207
Figely ads. Bailey .....	725
Finley, Secy. of State, v. Stone, Auditor .....	856
First National Bank, &c., ads. Bright, &c. ....	702

# Vol. 106] TABLE OF CASES REPORTED.

v

F. Ct. Boyle Co. ads. Bd. of C. of Danville—Klyman ads. Sebree City.

Fiscal Court of Boyle County ads. Board of Council of Danville..	608
Forsythe, &c. ads. Town of Providence, &c. ....	378
Forwood v. Eubank, Assignee, &c. ....	291
Friendship Lodge No. 5, I. O. O. F., of Lexington, ads. Wood, &c....	424
Gaertner ads. Meyer Bros.' Assignee .....	481
Galbraith v. Williams .....	431
Gatewood v. Long, &c. ....	721
George, &c., Commrs. of Penitentiary, v. Lillard, Warden .....	820
Gerteisen ads. London, & Lancashire Fire Insurance Co. ....	815
Gibson v. Commonwealth .....	360
Gilbert v. Commonwealth .....	919
Gleason v. Barnett .....	125
Gleason ads. Louisville, City of .....	125
Grogan ads. Hale .....	311
Hackworth v. Louisville Artificial Stone Co. ....	234
Hackworth v. O'Leary .....	234
Hale v. Grogan .....	311
Hall v. Commonwealth .....	894
Haly, &c., ads. Commonwealth .....	716
Hammond ads. Mutual Fire Ins. Co. of New York .....	386
Hampton, &c., ads. Sebree City .....	373
Hart ads. Pulaski County .....	500
Henderson ads. Payne .....	135
Herbst, Prest. of Board of Education, ads. Heyker .....	509
Heyker v. Herbst, Prest. of Board of Education .....	509
Heyker v. McLaughlin, &c. ....	509
Hill, &c., ads. Cooksey, &c. ....	297
Hoehner, ads. Ahrens & Ott Mfg. Co. ....	692
Howard, &c., v. Thompson Lumber Company .....	566
Hughes v. Carl, &c. ....	533
Jefferson County Court, &c., ads. Joyes, &c. ....	615
Johnson v. Mason Lodge No. 33 .....	838
Johnson ads. Turner, &c. ....	460
Jones, &c., v. Brand .....	410
Jones v. Middlesboro Town Lands Co., &c. ....	194
Joyes, &c., v. Jefferson County Fiscal Court, &c. ....	615
Judd's Admr. ads. C. & O. Ry. Co. ....	364
Kentucky Citizens' Bldg. & L. Assn. v. Lawrence .....	88
Kentucky Glass Works ads. Bell & Coggeshall Co. ....	7
Kentucky Trust Co., Trustee, v. Third Nat. Bank of Louisville...	232
King v. Middlesboro Town Lands Co., &c. ....	73
Klyman ads. Sebree City .....	373

Lane, &c. v. Lane, &c.—Mut. B. Life Ins. Co. of Newark v. Dunn.

Lane, &c., v. Lane, &c. ....	530
Lang's Admr., &c., ads. Aitken's Son & Co. ....	652
Larue's Assignee, &c., ads. Barbour's Admr. ....	546
Latonia Agricultural & Stock Assn. v. Donnelly, Tax Collector ..	325
Lawrence ads. Kentucky Citizens' Bldg. & Loan Assn. ....	83
Lillard, Warden, ads. George, &c., Commrs. of Penitentiary ...	820
Livermore v. Middlesboro Town Lands Co. ....	140
London & Lancashire Fire Ins. Co. v. Gerteisen ....	815
Long, &c., ads. Gatewood ....	721
Louisville Articial Stone Co. ads. Hackworth ....	234
Louisville Banking Co. v. Anderson, &c. ....	744
Louisville Bridge Co. v. L. & N. R. R. Co. ....	674
Louisville, City of, ads. Fidelity & Casualty Co. ....	207
Louisville, City of, v. Gleason, &c. ....	125
Louisville, City of, v. Selvage, &c. ....	730
Louisville Tobacco Warehouse Co. v. Com. ....	165
Louisville & Nashville R. R. Co. v. Adams' Admr. ....	859
Louisville & Nashville R. R. Co. v. Brantley's Admr. ....	849
Louisville & Nashville R. R. Co. v. Com. (long and short haul) ..	633
Louisville & Nashville R. R. Co. v. Creighton, &c. ....	42
Louisville & Nashville R. R. Co. ads. Louisville Bridge Co. ....	674
Louisville & Nashville R. R. Co. v. Stock's Admr., &c. ....	43
Louisville & Nashville R. R. Co. v. Taaffe's Admr. ....	535
Lucas, &c., ads. Salvage, use, &c. ....	730
Lyddane v. Owensboro Banking Co. ....	706
McAllister ads. Bridges, &c. ....	791
McLaughlin, &c., ads. Heyker ....	509
McNamara v. Schwanlger ....	1
Mason Lodge No. 33 ads. Johnson ....	838
Meyer Bros.' Assignee v. Gaertner ....	481
Middlesboro Town Lands Co., &c., v. Jones ....	194
Middlesboro Town Lands Co., &c., ads. King ....	72
Middlesboro Town Lands Co., &c., ads. Livermore ....	140
Middlesboro Town Lands Co., &c., ads. Ryan ....	181
Mitchell v. Commonwealth ....	602
Monarch v. Brey ....	688
Monarch Co., M. V., v. Farmers & Traders Bank. ....	206
Moore ads. Taulbee ....	749
Morehead's Admr. v. Bittner, &c. ....	523
Mossett, &c., v. Newport & Cincinnati Bridge Co. ....	518
Murray, &c., v. Preston, &c. ....	561
Mutual Benefit Life Ins. Co. of Newark v. Dunn. ....	591



Mutual Fire Ins. Co. of N. Y. v. Hammond. Secrest ads. Worland.

Mutual Fire Ins. Co. of New York v. Hammond.....	386
New Farmers' Bank, Trustee, v. Cockrell's Receiver.....	578
Newport, City of, v. Commonwealth.....	431
Newport & Cincinnati Bridge Co. ads. Mossett, &c.....	518
O'Leary ads. Hackworth.....	234
Owensboro Banking Co. ads. Lyddane.....	706
Paducah, City of, ads. Schauf's Admr.....	228
Park ads. Potts, &c.....	202
Parson's Admr. ads. Wilson.....	378
Payne v. Henderson .....	135
Peoples' Building & Savings Assn. v. Denton.....	186
Potts, &c., v. Park.....	202
Preston's Ex'r., &c., ads. Allison, &c. ....	763
Preston, &c., ads. Murray, &c.....	561
Price, &c., ads. Town of Providence, &c.....	373
Providence, Town of, v. Forsythe & Henry .....	378
Providence, Town of, v. Price & Frederick .....	378
Providence, Town of, v. Shackelford, &c. ....	378
Pulaski County v. Hart .....	500
Pulaski County v. Watson, Sheriff, &c.....	500
Pullins' Admr. v. Smith.....	418
Reddick v. United States Bldg. & L. Assn.....	94
Reynolds v. Commonwealth.....	37
Robertson, &c., ads. Smith.....	472
Rogers v. Farmers' Mutual Aid Assn. of Mason County.....	371
Rule ads. Yellow Poplar Lumber Company .....	455
Russellville, City of, ads. East Tenn. Telephone Co., &c.....	667
Ryan v. Caldwell .....	543
Ryan v. Middlesboro Town Lands Co., &c. ....	181
Safety Building & Loan Assn. v. Ecklar .....	113
Sanders' Admr. v. Babbitts, &c.....	646
Saunders ads. Stone, Auditor .....	904
Scanlan ads. Smith, &c.....	572
Schauf's Admr., v. City of Paducah.....	228
Schneider ads. District of Clifton, Campbell County.....	605
Schuster v. White's Admr.....	317
Schwaniger ads. McNamara .....	1
Scott v. Tulley .....	69
Seale, &c., ads. Spicer, &c.....	246
Sebree City v. Hampton & Rayborn .....	378
Sebree City v. Klyman.....	373
Secrest ads. Worland .....	711

## Selvage ads. Louisville. Yellow Poplar Lumber Co. v. Rule.

Selvage ads. Louisville, City of.....	730
Selvage v. Lucas .....	730
Shackleford, &c., ads. Town of Providence.....	378
Smith ads. Pullin's Admr.....	418
Smith v. Robertson, &c.....	472
Smith, &c., v. Scanlan.....	572
Speagle ads. Cunningham's Admr., &c.....	278
Spicer, &c., v. Seale.....	246
Spratt v. Allen .....	274
Stix, &c., v. Eversole's Admr., &c.....	516
Stock's Admr., ads. L. & N. R. R. Co.....	42
Stofer, &c., v. U. S. Bldg. & L. Assn.....	94
Stone, Auditor, ads. Finley, Secretary of State .....	356
Stone, Auditor, v. Saunders .....	904
Stone, Auditor, v. Wickliffe.....	252
Strong, &c., ads. Breathitt Coal, Iron & Lumber Co., The.....	699
Sumrall, &c., v. Commercial Bldg. Trust's Assignee, &c.....	260
Swinebroad, &c., ads. Bright's Exrs. ....	737
Taaffe's Admr., &c., ads. L. & L. R. R. Co.....	535
Taulbee v. Moore .....	749
Third Nat. Bank of Louisville, &c., ads. Ky. Tr. Co., Trustee.....	232
Thompson Lumber Co. ads. Howard, &c.....	566
Tilford, &c., v. Dotson .....	755
Tulley ads. Scott.....	69
Tunks v. Vincent .....	829
Turner, &c., v. Johnson.....	460
United States Building & Loan Assn. ads. Reddick.....	94
United States Building & Loan Assn. ads. Stofer.....	94
Union Trust Co., &c., ads. Cook.....	803
Vincent ads. Tunks .....	829
Wade v. Commonwealth .....	321
Wait, Treasurer, ads. Cooper .....	628
Watson, Sheriff, &c., ads. Pulaski County.....	500
Welch, &c., v. Welch, &c.....	406
White's Admr. ads. Schuster.....	317
Wickliffe ads. Stone, Auditor .....	252
Williams, ads. Galbraith, &c.....	431
Wilson v. Parson's Admr.....	385
Windmuller, &c., ads. Bank of Commerce of Buffalo, N. Y.....	395
Woods, &c., v. Friendship Lodge, No. 5, I. O. O. F., of Lexington.....	424
Worland v. Secrest .....	711
Wright, &c., ads. Clark, &c.....	81
Yellow Poplar Lumber Co. v. Rule.....	455

# Table of Cases, Cited, Explained, Etc.

In the Cases Reported in this Volume.

Adams Express Co. v. Kentucky, 166 U. S., 180; (17 Sup. Ct., 530).....	168
Alford v. Marsh, 12 Allen, 603.....	779
Allis v. Jones, 45 Fed. Rep., 148.....	13
Anderson v. Columbia Trust Co., (50 S. W., 40).....	697
Anderson v. Jett, 89 Ky., 375; (12 S. W., 670).....	876
Andes v. Ely, 158 U. S., 312; (15 Sup. Ct., 267).....	844
Andrews v. Pipe Works, 23 C. C. A., 454; (77 Fed. Rep., 774) ...	844
Arnold v. Shields, 5 Dana, 19; (30 Am. Dec., 669).....	71
Association v. Norman, 98 Ky., 294; 56 Am. St. Rep., 367; (32 S.	
W., 952) .....	211
Atchison, &c., R. Co. v. Wilson, 33 Kan., 223; 6 Pac., 281.....	383
Auerbach v. Mill Co., 28 Minn., 291; 41 Am. Rep., 285; (9 N. W.,	
801) .....	23
Bacon v. Ky. Cent. Ry. Co., 95 Ky., 373; (25 S. W., 747).....	458
Bailey v. Com., 11 Bush, 688.....	498
Bailey v. New York, 3 Hill, 531; (38 Am. Dec., 669),.....	442
Baker v. Baker, 87 Ky., 461; (9 S. W., 382).....	250
Baker v. Selva & Snider, 7 Ky. L. Rep., 838.....	733
Baldwin v. Hewitt, Auditor, 88 Ky., 678; (11 S. W., 803).....	330
Ball v. Lively, 4 Dana, 370.....	155
Ballowe, &c., v. Hillman, 18 Ky. L. Rep., 677; (37 S. W., 950)....	701
Baltimore Cent. Natl. Bank v. Connecticut Mut. L. Ins. Co., 104	
U. S., 54, 67.....	589
Bank of South Carolina v. Knotts, 10 Rich. Law, 543.....	657
Bank of U. S. v. Bank of Washington, 6 Pet., 9.....	798
Bank v. Boyd, 99 Cal., 604; 34 Pac. 337.....	844
Bank v. Flint, 34 Ark., 40; (14 S. W., 769) .....	138
Bank v. Rice, 45 Pac., 515.....	583
Bank v. Thomas, 8 Ky., Law Rep., 690; 3. S. W., 12).....	807
Bank v. Trimble, 6 B. M., 601.....	844
Barbour v. Board of Trade, 82 Ky., 649.....	442
Barbour's Admr. v. Larue's Assignee, 96 Ky., 326; (28 S. W., 790).....	548
Barbour v. Louisville, City of, 83 Ky., 102.....	171
Barney v. Winona, &c., R. R. Co., 117 U. S., 228; (6 Sup. Ct., 654).....	802
Barrett v. Rhem, 6 Bush, 466.....	417
Bates v. Commonwealth, (19 S. W., 928).....	224

**Batterton v. Fuller. Cain & McGuire.**

Batterton v. Fuller, (60 N. W., 1071).....	332
Batturms v. Megary, 1 Brewst., 162.....	333
Beaupre v. P. & N. A. Telegraph Co., 21 Minn., 155.....	664
Beaven v. Citizens' National Bank, 19 Ky. Law Rep., 1261; (43 S. W., 242) .....	586
Beckett v. Ry. Co. L. R., 1 C. P., 241; L. R., 3 C. P., 82 .....	352
Bertche v. B. & L. Co., (48 S. W., 954).....	296
Bettison v. Budd, 17 Ark., 546; (65 Am. Dec., 442).....	574
Birch v. Powell, 15 Ky. Law Rep., 445.....	417
Birney v. Richardson, 5 Dana, 424.....	310
Bitteler v. Bitteler's Admr., 13 Ky. L. Rep., 368.....	423
Board of Councilmen of Frankfort v. Murray, 99 Ky., 422; (36 S. W., 180) .....	237
Board of Councilmen of Frankfort v. Scott, 19 Ky. Law Rep., 1068; (42 S. W., 104) .....	533
Board of Trade Telegraph Co. v. Barnett, (47 Am. Rep., 453).....	670
Boggs v. Commonwealth, (5 S. W., 307).....	395
Borough of New Brighton v. Peirsol, 107 Pa. St., 280 .....	348
Bosquett v. Hall, 90 Ky., 567; (12 S. W., 244) .....	748
Boyd v. Smoot, 5 Ky. Law Rep., 119 .....	184
Bracy v. Bracy's Admr., 12 Bush, 154.....	316
Bradford v. Parkhurst, 31 Am. St. Rep., 189; 30 Pac., 1106....	785
Bradley v. Reppell, 133 Mo., 545; (54 Am. St. Rep., 685; 32 S. W., 645; 34 S. W., 841),.....	844
Bransom's Admr. v. Labrot, 81 Ky., 638; (50 Am. Rep., 193).....	230
Brewster v. Miller; (41 S. W., 301).....	889
Briggs v. Railroad Co., 79 Me., 363; (1 Am. St. Rep., 316); 10 Atl., 47 .....	340
Broaddus v. Broaddus' Heirs, 10 Bush, 109.....	621
Broome v. N. Y. & N. J. Telephone Co., 42 N. J. Eq., 141; 7 Atl., 851 .....	670
Brown v. Archer, 1 Mo. App., 465.....	112
Brown v. Chadbourne, 31 Me., 9; (50 Am. Dec., 641).....	564
Brown v. Duncan, 10 Barn & Cr., 93 .....	477
Bruster & Maverick v. Marvel, 90 N. Y., 656 .....	285
Buckley v. Humason, 16 L. R. A., 423; (52 N. W., 385).....	474
Buckley v. Schwartz, 83 Wis., 304; (53 N. W., 511).....	257
Buford v. Brown, 6 B. M., 553.....	156
Burke v. Rhodes, 13 Ky. Law Rep., 431.....	693
Burks, et ux., v. Albert, 4 J. J. M., 97; (20 Am. Dec., 209).....	24
Byassee v. Reese, 4 Met., 372; (83 Am. Dec., 481) .....	760
Cain v. McGuire, 13 B. M., 341.....	760

---

 Calloway v. Glenn. Com. v. Frankfort, City of.
 

---

Calloway v. Glenn, Trustee, 20 Ky. Law Rep., 1447; (49 S. W., 440).....	109
Camley v. Stanfield, 10 Tex., 546.....	574
Campbell v. Hillman, 15 B. M., 517; (61 Am. Dec., 195).....	155
Carden v. Railroad Co., (39 S. W., 1027).....	851
Cardwell v. Atwater, 15 Ky. Law Rep., 570 .....	761
Carew v. Rutherford, 106 Mass., 14.....	885
Carington v. Com., 78 Ky., 83 .....	917
Carson v. Cochran, (53 N. E., 1130).....	809
Casey v. Typographical Union, 45 Fed. Rep., 135.....	886
Cassidy v. Young, 92 Ky., 227; (17 S. W., 485).....	433
Central National Bank v. Hume, 128 U. S., 195; (9 Sup. Ct., 41).....	553
Central Trust Co. of N. Y. v. Columbus, H. V. & T. Ry. Co., 87 Fed. Rep., 815.....	18
Chamberlain v. Ry. Co., 2 Best & S. 605; 110 E. C. L., 605, 617....	352
Chambers, &c., v. Davis, 15 B. M., 522.....	191
Chenowith v. Com., (12 S. W., 585).....	899
C. & O. Ry. Co. v. Lang's Admr., 100 Ky., 221; 19 Ky. Law Rep., 65; (38 S. W., 503).....	53
Chicago, City of, v. Taylor, 125 U. S., 162; (8 Sup. Ct., 820).....	347
Chicago, City of, v. Union Bldg. Assn., 102 Ill., 379; (40 Am. Rep., 598) .....	348
Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S., 418; (10 Sup. Ct., 462, 702).....	645
Clark v. Louisville Water Co., 90 Ky., 515; (14 S. W., 502)....	172, 443
Clark v. Rodes, 12 Bush, 16.....	796
Clark v. Scripps, 2 Rob., 567.....	649
Clark v. Tanner, 100 Ky., 278; (38 S. W., 11) .....	161
Clay v. Williams, 2 Munf., 105; (5 Am. Dec., 453).....	422
Clement v. Everest, 29 Mich., 19.....	383
Cloud v. Clinckinbeard, 8 B. M., 397; (48 Am. Dec., 400) .....	244
Coe v. Columbus R. R. Co., (75 Am. Dec., 518).....	175
Coffey v. United States, 116 U. S., 436; (6 Sup. Ct., 437).....	908
Cohens v. Virginia, 6 Wheat., 264.....	778
Collopy v. Cloherty, 95 Ky., 330; (25 S. W., 497).....	831
Colly Construction Co. v. Seymour, &c., 91 U. S., 650.....	569
Combs v. Com., (20 S. W., 268).....	895
Commander v. State, 60 Ala., 1.....	220
Com. v. Arnold, 83 Ky., 1.....	258
Com. v. Branham, 8 Bush, 387.....	527
Com. v. Bush, 2 Duv., 264.....	823
Com. v. Duncan, 91 Ky., 594; (16 S. W., 530).....	528
Com. v. Frankfort, City of, 92 Ky., 149; (17 S. W., 287).....	669

## Com. v. Hawkins. Ellis v. Davis.

Com. v. Hawkins, 11 Bush, 603.....	527
Com. v. Kammerer, 11 Ky. Law Rep., 777; (13 S. W., 108).....	525
Com. v. Makibben, 90 Ky., 384; (29 Am. St. Rep., 382; 14 S. W., 372) .....	441, 172
Com. v. Nicely, 130 Pa. St., 261; (18 Atl., 737).....	226
Com. v. Ward, 92 Ky., 158; (17 S. W., 283).....	372
Cooper v. Nevin, 90 Ky., 85; (13 S. W., 841).....	733
Covington, City of, v. Commonwealth, 19 Ky. Law Rep., 105; (39 S. W., 836) .....	442
Craig v. Cogar, Hardin, 386.....	700
Cromwell v. County of Sac., 94 U. S., 351.....	319, 445
Cross v. Railroad Co., 77 Mo., 318.....	356
Crozier v. Cundall, 99 Ky., 202; (35 S. W., 546).....	310
Curtis v. State, 6 Colo., 11.....	227
Daniel v. McHenry, 4 Bush, 277.....	574
Davenport, City of, v. Chicago, R. I. & P. R. Co., 38 Iowa, 633, 640 .....	445
Dearborn v. Mathes, 128 Mass., 194.....	779
Deboe v. Lowen, 8 B. M., 616.....	303
Depew v. Bank, 1 J. J. Mar., 380.....	844
Detroit St. Ry. Co. v. Mills, 46 A. & E. R. R., Cases., 616; (48 N. W., 1011) .....	341
DeWitte v. Berry, 134 U. S., 306; (10 Sup. Ct., 536).....	715
Dickey v. Dickinson, 20 Ky. Law Rep., 1559; (49 S. W., 761) ..	459
Divine v. Harvey, 7 T. B. M., 440.....	715
Doe v. Harris, 6 Adol. & E., 209 .....	650
Donahue v. Drexler, 32 Ky. 157; (56 Am. Rep., 889).....	529
Donaldson v. Security T. & V. Co., 20 Ky. Law Rep., 857.....	312
Drake v. Ramsey & Logan, Hardin 34.....	700
Drury v. Defontain, 1 Taunt., 136 .....	477
Dudley v. Beatty, 5 Ky. Law Rep., 773.....	797
Dunlap v. New Zealand, 109 Cal., 365; 42 Pac., 29. ....	698
Duty v. Graham, 12 Tex., 427.....	807
Dwelly v. Galbraith, 5 Ky. Law Rep., 209.....	276
East Line Ry. Co. v. Scott, 72 Tex., 70; 13 A. S. R., 753; (10 S. W., 99) .....	459
Eastman v. Plumer, 46 N. H., 464.....	785
Edgerton v. Com., 7 Bush, 143 .....	924
Edwards v. Knight, 8 Ohio, 375.....	832
Elgin, City of, v. Eaton, 83 Ill., 535; (25 Am. Rep., 412).....	352
Elliot v. Smith, 23 Pa. St., 131.....	574
Ellis v. Davis, 90 Ky. 185; (14 S. W., 74).....	748

## Ellis v. Johnson.    Gilbert v. Bartlett.

Ellis v. Johnson, 4 Ky. Law Rep., 991 .....	586
Emery v. Fowler, (63 Am. Dec., 627).....	800
English v. Thomasson, 82 Ky., 280.....	156
Eureka Iron Works v. Bresnahan, (27 N. W., 524).....	14
Evans v. Com., 11 Ky. Law Rep., 551; (12 S. W., 767).....	523
Evertson v. Sawyer, 2 Wend, 507.....	574
Ewell v. Daggs, 108 U. S., 143; (2 Sup. Ct., 408).....	807
Fargo Gaslight & Coke Co. v. Fargo Gas & E. L. Co., 37 L. R. A., 607 .....	185
Farrer v. Close, L. R., 4 Q. B., 602, 612 .....	885
Farrington v. Tennessee, 95 U. S., 686.....	453
Fehler v. Gosnell, 99 Ky., 380; (35 S. W., 1125) .....	732, 134
Ferris v. Van Vechten, 73 N. Y., 118.....	586
Fietsam v. Hay, (3 Am. St. Rep., 493; 13 N. E., 501).....	175
First Nat. Bank of Covington v. Gaines, 87 Ky., 597; (9 S. W., 396) .....	706
First Nat. Bank of Covington v. D. Kiefer Milling Co., The, 95 Ky., 97; (23 S. W., 675).....	19
First Nat. Bank of Stanford v. Mattingly, 92 Ky., 657; (18 S. W., 940) .....	160
Fishback v. Green, 87 Ky., 107; (7 S. W., 881).....	109
Fitzgerald, Trustee, v. Maupin's Admr., 5 Ky. Law Rep., 242 ....	139
Flanagan v. Cushman, 48 Tex., 241.....	807
Foreman v. Hunt, 3 Dana, 621.....	798
Fowler v. Equitable Trust Co., 141 U. S., 384; (12 Sup. Ct., 1) ..	138
Francis v. Wood, 81 Ky., 16.....	723
Franklin Ins. Co. v. Louisville & A. Packet Co., 9 Bush, 590....	847
Fraser's Exr. v. Page, 82 Ky., 73.....	797
Frelinghuysen v. Nugent, 36 Fed. Rep., 229.....	583
Gaar, &c., v. Louisville Banking Co., 11 Bush, 180; 21 Am. Rep., 209) .....	233
Garrett v. Plow Co., 70 Iowa, 679; (59 Am. Rep., 461; 29 N. W., 395) .....	29
Gedge v. Shoenberger, 83 Ky., 92.....	493
Geigers v. Kaigler, 9 S. C., 401.....	423
Gelston v. Hoyt, 3 Wheat., 246.....	909
George v. Putney, 4 Cush., 351.....	574
German Ins. Co. v. Landram, 88 Ky., 433; (11 S. W., 367, 592)....	432
German Nat. Bank v. Louisville Butchers' Hide & Tallow Co., 97 Ky., 34; (29 S. W., 882).....	33
Gilbert v. Bartlett, 9 Bush. 54.....	776

## Gibson v. Safety. Hewitt, Auditor, v. Craig.

Gibson v. Safety, &c., Assn., 170 Ill., 44; (48 N. E., 580); 39 L. R. A., 202 .....	295
Giles v. Warren, L. R., 2 Prob. & Div., 401.....	649
Gillespie v. McGowan, 45 Am. Rep., 365.....	230
Gill's Admx. v. Ky., &c., Mining Co., 7 Bush, 739 .....	384
Goodenow v. Litchfield, 59 Iowa, 226; (9 N. W., 107; 13 N. W., 86) ..	452
Gordon v. Preston, (26 Am. Dec., 75).....	14
Gosnell v. Louisville, City of, 20 Ky. Law Rep., 523; (46 S. W., 722) .....	735
Graham v. Pan Coast, 30 Pa. St., 89.....	158
Green v. Commonwealth, (18 S. W., 515).....	224
Green v. Page, 80 Ky., 370.....	255
Haldeman v. Ainslie, 82 Ky., 399.....	33
Hale v. Cairns, (77 N. W., 1010).....	112
Hall v. Martin, 89 Ky., 9; (11 S. W., 953).....	701
Hall v. Mayor, &c., L. R., 2 C. P., 322.....	352
Hallett v. Novion, 14 Johns., 273.....	477
Hamilton v. Fugett, &c., 81 Ky., 366.....	701
Hardin's Admr., v. Taylor, 78 Ky., 593.....	289
Harris v. Fawcett, L. R., 15 Eq., 311.....	657
Harrison v. Commonwealth, 83 Ky., 162.....	171
Hastings, City of, v. Foxworthy, 34 L. R. A., 344; (63 N. W., 955).....	802
Hatch v. Proctor, 102 Mass., 351.....	779
House v. Mannheimer, (69 N. W., 810).....	844
Hays v. Griffith, 85 Ky., 375; (3 S. W., 431; 11 S. W., 306) .....	797
Hayward v. National Ins. Co., The, 14 Am. Rep., 400.....	376
Heckman's Admr., v. L. & N. R. R. Co., 85 Ky., 631; (4 S. W., 342) .....	437
Hedin v. Minn. Med. & Surg. Inst., 35 L. R. A., 420 .....	185
Heiskell v. Mayor, &c., 65 Md., 125; 57 Am. Rep., 308; (4 Atl. 466) .....	513
Hemp v. Garland, 4 Q. B., 519.....	545
Henderson Br. Co. v. Ky., 166 U. S., 154; (17 Sup. Ct., 534).....	167
Henderson Br. Co. v. O'Connor & McCollough, 88 Ky., 303; (11 S. W., 18, 957).....	571
Henderson, City of, v. McClain, 102 Ky., 402; (43 S. W., 701).....	345
Henderson & N. R. R. Co. v. Leavell, 16 B. M., 363.....	384
Herndon v. Commonwealth, (48 S. W., 989).....	899
Herndt v. Porterfield, (9 N. W., 322).....	810
Hester v. Commonwealth, (29 S. W., 875).....	893
Hetterman v. Powers, (43 S. W., 180) .....	889
Hewitt, Auditor, v. Craig, 86 Ky., 23; (5 S. W., 280).....	515



## Heyer v. Pruyn. Jones v. Bank of Tennessee.

Heyer v. Pruyn, 7 Paige, 465; (34 Am. Dec., 355).....	809
Hickox & Read Pub. Co. v. Dawes Mfg. Co., 64 Ill. App., 630....	844
Hill v. Bain, (2 Am. St. Rep., 873; 23 Atl., 44).....	800
Hilton v. Eckersley, 6 El. & Bl., 47.....	883
Hobart v. Young, 12 L. R. A., 694; (21 Atl., 612) .....	715
Hobbs v. Knight, 1 Curt. 779.....	650
Hohenshell v. Saving Assn., 140 Mo. 566; (41 S. W., 948).....	107
Holliday v. McKinne., 22 Fla., 161.....	285
Honore v. Hutchings, 8 Bush, 687.....	404
Hooper v. Hobson, 57 Me., 273; (99 Am. Dec., 770).....	564
Hopkins v. Hopkins' Admr., 92 Ky., 327; (17 S. W., 864) .....	597
Hornby v. Close, L. R., 2 Q. B., 153 .....	885
Householder v. Kansas, City of, 83 Mo., 488.....	356
Houston v. Kidwell, 83 Ky., 301; 12 Ky., L. R., 387; (14 S. W., 377) .....	438
Howard, Sheriff, v. Commonwealth, 105 Ky., 604; (49 S. W., 466).....	507
Howard v. Leavell, 10 Bush, 481).....	516
Howard v. Zimbleman, (14 S. W., 59).....	286
Hubbard v. Bell, 5 Am. Rep., 99.....	565
Huffaker v. Bank, 12 Bush, 287.....	244
Hughes v. Bank, 5 Litt., 635.....	844
Hughes v. Edwards, 9 Wheat., 489.....	807
Hughes v. Hughes, 12 B. M., 115.....	304
Hughes v. Somerset Bank, 5 Litt., 46.....	384
Huhlein v. Huhlein, 87 Ky., 247; (8 S. W., 260).....	191
Hunt v. Roberts, 45 N. Y., 691.....	545
Hurd v. People, 25 Mich., 405.....	227
Hurlbut v. Hurlbut, 49 Hun., 192; 1 N. Y. Sup., 854 .....	557
Hurry v. Kline, 93 Ky., 358; (20 S. W., 277) .....	286
Huston v. Reutlinger, 91 Ky., 333; (15 S. W., 867).....	876
Hutchins v. Hutchins, 7 Hill, 107.....	884
Hutsell v. Deposit Bank, 19 Ky. L. R., 1492; (43 S. W., 469) ...	493
Hydraulic Works Co. v. Orr, 2 Norris, 332.....	230
Jasper v. Hamilton, 3 Dana, 283.....	154
Jernigan v. Madisonville, City of, 19 Ky. Law Rep., 1412; (43 S. W., 448).....	382
Jewell v. Clark's Exr., 78 Ky., 398 .....	276
Johnson v. Association, (21 S. W., 961).....	810
Johnson v. Hudson, 11 East 180.....	477
Johnson v. Kessler, 87 Ky., 460; (9 S. W., 394).....	277
Johnson v. Miller, 69 Iowa, 562; 58 Am. Rep., 231; (29 N. W., 743).....	698
Johnson v. Parker, 4 Bush, 149.....	405
Jones v. Bank of Tennessee, 8 B. M., 123; (46 Am. Dec., 540) ..	429, 844

---

Jordan v. Dobbins. Lou. Sou. Ry. v. Minogue.

---

Jordan v. Dobbins, 122 Mass., 168; 23 Am. Rep., 305 .....	655
Kaye v. Kean, 18 B. M., 847.....	796
Kibbey v. Jones, 7 Bush, 243.....	706
Kendall v. Clarke, 90 Ky., 179; (13 S. W., 583).....	805
Kennedy v. Panama Mall Co., Law Rep., 2 Q. B., 580.....	153
Kenton Ins. Co. v. Downs, 90 Ky., 236; (13 S. W., 882).....	817
Keokuk. & W. R. R. Co. v. Missouri, 152 U. S., 314; (14 Sup. Ct., 597) .....	444
Kerley v. Hume, 3 T. B. Mon., 183.....	78
Killinger v. 42d. Street St. Ry. Co., 50 N. Y., 206 .....	339
King v. Investment Union, (48 N. E., 677).....	272
King v. Noland, 20 Ky. Law Rep., 186; (45 S. W., 508).....	586
Koehler v. Adler, 91 N. Y., 657 .....	285
Kuhn v. Port Townsend, 29 L. R. A., 447; 41 Pac., 925.....	383
Lahr v. Railway Co., 104 N. Y., 268; (10 N. E., 528).....	356
Lall v. Mt. Sterling Coal Road Co., 13 Bush, 34 .....	429
Lake Shore & M. S. Ry. Co. v. People, 46 Mich., 208; (9 N. W., 249) .....	446
Lake Shore & M. S. Ry. Co. v. Smith, (19 Sup. Ct., 565).....	645
Lancaster v. Clayton, 86 Ky., 373; (5 S. W., 864).....	172
Lancaster v. Langston, 18 Ky. Law Rep., 299; (36 S. W., 521)....	697
Lathrop v. Bank, 8 Dana, 121.....	877
Latimer v. Building & L. Co., 81 Fed. Rep., 776.....	273
Law v. Hodgson, 2 Camp., 147.....	476
Ledbetter v. Hall, 62 Mo., 423.....	831
Leslie v. Commonwealth, (42 S. W., 1095).....	221
Lewis v. Coffee County, 54 Am. Rep., 55.....	565
Lightburn v. Cooper, 1 Dana, 273.....	153
Lindsey v. Rutherford, 17 B. M., 248 .....	479
Livermore v. Middlesboro Town Lands Co., (50 S. W., 6; 105 Ky. 140) .....	201
Lockland v. Railroad Co., 31 Mo., 131.....	356
Lockhart v. Van Alstyne, 31 Mich., 76; (18 Am. Rep., 156).....	269
Loeser v. Redd, 14 Bush, 18.....	237
London Ind. R. Co. <i>in re</i> 5 L. R. Eq., 519 .....	270
Long v. Stone, (39 S. W., 836).....	621
Louisville Bagging Co. v. Central Pass. Ry. Co., 95 Ky., 50; (44 Am. St. Rep., 203).....	341
Louisville, City of, v. Commonwealth, 1 Duv., 298; (85 Am. Dec., 624) .....	443
Louisville Southern Ry. v. Minogue, 12 Ky. Law Rep., 378; (14 S. W., 357) .....	48

---

Louisville Water Co. v. Kentucky.    Mahlman v. Williams.

---

Louisville Water Co. v. Kentucky, 89 Ky., 244; (12 S. W., 300).....	330
Louisville Water Co. v. Upton, 18 Ky. Law Rep., 326; (36 S. W., 520) .....	48
Louisville & Nashville R. R. Co. v. Com., 104 Ky., 226; (46 S. W., 707; 47 S. W., 210, 598).....	638
Louisville & Nashville R. R. Co. v. Eakin's Admr., 103 Ky., 465; 20 Ky. Law Rep., 743; (46 S. W., 496; 47 S. W., 872).....	55
Louisville & Nashville R. R. Co. v. Earl's Admr., 94 Ky., 375; (22 S. W., 607).....	361
Louisville & Nashville R. R. Co. v. Goodnight, 10 Bush, 553; (19 Am. Rep., 80) .....	257
Louisville & Nashville R. R. Co. v. Graham's Admr., 17 Ky. L. R., 1229; (34 S. W., 229).....	56
Louisville & Nashville R. R. Co. v. Hall, 12 Bush, 131.....	437
Louisville & Nashville R. R. Co. v. Harvey, 17 Ky. Law Rep., 1368; (34 S. W., 1069).....	459
Louisville & Nashville R. R. Co. v. Kelly's Admr., 19 Ky. Law Rep., 69; (38 S. W., 852).....	541, 56
Louisville & Nashville R. R. Co. v. McEwan, 17 Ky. Law Rep., 406; (31 S. W., 465).....	43
Louisville & Nashville R. R. Co. v. Morris, 14 Ky. Law Rep., 456; (20 S. W., 539).....	52
Louisville & Nashville R. R. Co. v. Offutt, 18 Ky. Law Rep., 304; (36 S. W., 181).....	459
Louisville & Nashville R. R. Co. v. Pendleton County, 96 Ky., 491; (29 S. W., 324).....	624
Louisville & Jeffersonville Ferry Co. v. Commonwealth, 104 Ky., 726; (47 S. W., 877).....	166
Lowry v. Fisher, 2 Bush, 72; (92 Am. Dec., 475).....	706
McAllister v. Bridges, 19 Ky. Law Rep., 107; (40 S. W., 70).....	795
McCartney v. Board, Law Rep., 7 C. P., 508.....	352
McCauley v. Tierney, 19 R. I., 255; (61 Am. St. Rep., 770).....	885
McCracken County v. Mercantile Trust Co., 84 Ky., 344; (1 S. W., 585) .....	807
McCutcheon's Appeal, 99 Pa. St., 133.....	558
McElroy v. Kansas City, 21 Fed. Rep., 257.....	353
McElroy v. Minnesota Percheron Horse Co., 96 Wis., 317; (71 N. W., 652) .....	14
McKee v. McKee, 8 B. Mon., 433.....	85
McKee v. Smith's Admr., 5 Ky. Law Rep., 224.....	797
McKinney. <i>in re</i> 15 Fed., 536 .....	555
Mahlman v. Williams, 89 Ky., 282; (12 S. W., 335) .....	409

---

Manning v. Ancient O. U. W. National Bank v. Peck.

---

Manning v. Ancient O. U. W., 86 Ky., 139; (9 Am. St. Rep., 270; 5 S. W., 385).....	597
Manufacturing Co. v. Canney, 54 N. H., 295.....	28
Manufacturing Co. v. Hollis, 54 Minn., 223; (40 Am. St. Rep., 319).....	889
Marion Co. v. Wilson, 20 Ky. Law Rep., 1193; (49 S. W., 8).....	522
Marksbury v. Taylor, 10 Bush, 523.....	158
Marrett v. Babb's Exr., 91 Ky., 93; (15 S. W., 4).....	776
Marsh v. Alford, 5 Bush, 392.....	706
Marshall v. Peck, 1 Dana, 609.....	161
Martin v. Commonwealth, 93 Ky., 193; (19 S. W., 580).....	220
Matherly v. Commonwealth, (19 S. W., 977).....	224
Matthews v. Lloyd, 89 Ky., 629; (13 S. W., 107).....	404
Meador v. Meador, 88 Ky., 217; (10 S. W., 651).....	277
Meazels v. Martin, 93 Ky., 50 (18 S. W., 1028).....	290
Mechanics Tr. Co. v. Cobb., 14 Ky. Law Rep., 444; (20 S. W., 391) .....	109
Meroney v. Assn., 116 N. C., 898; (47 Am. St. Rep., 841; 21 S. E., 924) .....	113
Metz v. Buffalo R. R., 17 Am. Rep., 201.....	175
Meyer v. L., St. L. & T. Ry. Co., 17 Ky. Law Rep., 945; (33 S. W., 98) .....	697
Miles v. Collins, 1 Met., 308.....	404
Miles v. Connecticut Mutual L. Ins. Co., 147 U. S., 177; (13 Sup. Ct., 275) .....	598
Miller v. Bennett, 11 Ky. Law Rep., 391; (12 S. W., 194).....	276
Miller v. Hayden, 91 Ky., 215; (15 S. W., 243) .....	794
Mills v. Swearingen, 67 Tex., 270; (3 S. W., 268).....	582
Montjoy's Admr. v. Pearce, 4 Met., 97.....	244
Moore v. Settle, 82 Ky., 187; (56 Am. Rep., 889) .....	525
Morgan v. King, (91 Am. Dec., 58).....	565
Moss v. Meshew, 8 Bush, 187.....	761
Mount v. Commonwealth, 2 Duv., 93.....	895
Moxley's Admrs. v. Moxley, 2 Met., 309.....	244
Muldoon v. Hite, 6 Ky. Law Rep., 663.....	496
Munn v. Illinois, 94 U. S., 113.....	172
Murphy v. Estes, 6 Bush, 532.....	244
Myers v. Board of Education, 51 Kan. 87; (37 Am. St. Rep., 263; 32 Pac. 658).....	583
Nance v. Boyer, 30 Pa. St., 109.....	158
Nash v. Page, 80 Ky., 539; (44 Am. St. Rep., 490).....	172
Nathan v. Louisiana, 8 How., 73.....	877
National Bank v. Peck., 8 Kan., 662.....	544

## Navigation Co. v. Wood. Philpot v. Commonwealth.

Navigation Co. v. Wood, 17 Barb., 382.....	29
Neel v. Neel, 16 Ky. Law Rep., 195; (26 S. W., 805).....	153
Nellis v. Lathrop, 22 Wend., 121; (24 Am. Dec., 285) .....	574
Nesbit v. Independent District of Riverside, 144 U. S., 610; (12 Sup. Ct., 746).....	445
Nevin v. Roach, 86 Ky., 499; (5 S. W., 546).....	733
Newcomb's exrs. &c., v. Newcomb, &c., 13 Bush 544; (26 Am. Rep., 222.) .....	915
New Orleans, City of, v. Citizens' Bank, 167 U. S., 396; (17 Sup. Ct., 905) .....	451
Newport, City of, v. Newport Light Co., 84 Ky., 166.....	669
N. Y. El. R. R. Co. v. Fifth Nat. Bank, 118 U. S., 608; (7 Sup. Ct., 23) .....	315
N. Y. Life Ins. Co. v. Eggleston, 96 U. S., 572.....	375
Nonotuck Silk Co. v. Flanders, (58 N. W., 383).....	586
O'Brian v. Commonwealth, 6 Bush, 563.....	802
Offord v. Davies, 12 C. B., 748.....	656
Orr v. Insurance Co., 12 La. Ann., 255; (68 Am. Dec., 770).....	885
Orth & Wallace v. Clutz's Admr., 18 B. M., 224.....	314
Osborne v. Stevens, 15 Wash., 478; 46 Pac., 1027.....	708
Overton & Reed v. Roberts, 4 Bibb, 156.....	700
Owensboro v. Commonwealth, (49 S. W., 320).....	441
Pacific Postal Telegraph Cable Co. v. Irvine, &c., 49 Fed. Rep., 113 .....	670
Paducah Land, Coal & Iron Co. v. Cochran, Assignee, &c., 18 Ky. Law Rep., 465; (37 S. W., 67) .....	690
Parks' Exr. v. Cooke, 3 Bush, 168.....	545
Patapsco, The, 12 Wall., 451.....	316
Patterson St. Ry. Co. v. Grundy, 56 A. & E. R. R. Cas., 456, (26 Atl., 788) .....	340
Paul v. Virginia, 8 Wall, 168.....	876
Peak v. Gore, 94 Ky. 534; (23 S. W., 356).....	157
Pekin, City of, v. Brereton, 67 Ill., 477; 16 Am. Rep., 629.....	352
Pekin, City of, v. Winkel, 77 Ill., 56.....	352
Pells v. Brown, Cro. James, 590.....	309
Pennsylvania Co. v. Dolan, 6 Ind. App., 109; (32 N. E., 802).....	458
People v. Pease, 27 N. Y., 45; (84 Am. Dec., 242).....	836
Perkins v. Sterne, 23 Tex., 561; (76 Am. Dec., 72).....	807
Peters v. Bain, 133 U. S., 670; (10 Sup. Ct., 354).....	588
Phelps v. Quinn, 1 Bush, 376.....	155
Philadelphia Nat. Bank v. Dowd, 38 Fed. Rep., 173.....	587
Philpot v. Commonwealth, 86 Ky. 595; (6 S. W., 455).....	527

## Phoenix Ins. Co. v. Spliers &amp; Thomas. Ross v. Braydon.

Phoenix Ins. Co. v. Spliers & Thomas, 87 Ky., 297; (8 S. W., 453) .....	817, 376
Pierson v. People, 79 N. Y., 424; 35 Am. Rep., 524.....	323
Pinckord v. State, 13 Tex., 478.....	220
Plummer v. Mercantile Co., 23 Colo., 190; 47 Pac., 294.....	844
Pool v. Benning, 9 B. M., 623.....	310
Pool v. West Point Butter Assn., 30 Fed. Rep., 513.....	14
Prewitt v. Trimble, 92 Ky., 177; (36 Am. St. Rep., 586; 17 S. W., 356) .....	159
Prewitt v. Wortham, 79 Ky. 287.....	808
Price v. Kendall, (36 S. W., 810).....	112
Printing Co. v. Howell, 26 Ore., 527; 38 Pac., 547.....	885
Pryor v. Mizner, 79 Ky., 232.....	776
Pryse v. Peoples B. L. & Savings Assn., 19 Ky. Law Rep., 752; (41 S. W., 574).....	233
Purdy v. Drake, 17 Ky. Law Rep., 819; (32 S. W., 939).....	237
Queen Ins. Co. v. Texas, 86 Tex., 250; (24 S. W., 397).....	886
Rafferty v. Central Traction Co., 147 Pa. St., 579; (30 Am. St. R., 763; 23 Atl., 884).....	339
Railroad Co. v. Auditor General, 9 Mich., 448.....	452
Railroad Co. v. Reich, 101 Ill., 157.....	348
Railway Co. v. Francis, 70 Ill., 238.....	352
Railway Co. v. Gattke, 3 MacN. & G., 155.....	352
Ray v. Sweeney, 14 Bush, 2; 9 Am. Rep., 388.....	878
Reddick, &c., v. U. S. Bldg. & L. Assn., 20 Ky. Law Rep., 1720; (50 S. W., —).....	293
Reed v. Van Ostrand, 1 Wend., 424; (19 Am. Dec., 529).....	715
Rex v. Duchess of Kingston, 20 Howell St. Tr., 355, 538.....	909
Rex v. Mawbey, 6 Term. R., 636.....	881
Rhode Island Underwriters Assn. v. Monarch, 98 Ky., 305; (32 S. W., 959) .....	394
Rhorer, Recelver, v. Middlesboro Town & Lands Co., 19 Ky. Law Rep., 1788; (44 S. W., 448).....	93
Rigney v. Chicago, City of, 102 Ill., 64.....	347
Rilling v. Thompson, 12 Bush, 310.....	233
Robbins v. Chicago, City of, 4 Wall., 672.....	800
Robertson v. Clarkson, 9 B. M., 506.....	156
Robinson v. Woodward, 20 Ky. Law Rep., 1142; (48 S. W., 1082).....	587
Rogers v. Farmers' Mutual Aid Assn., 20 Ky. Law Rep., 1925; (50 S. W., 543).....	818
Rogers v. Raines, 100 Ky., 295; (38 S. W., 483).....	111
Ross v. Braydon, 2 Dana, 101.....	184

---

Rudd v. N., C. & St. L. R. R. Co.    Stamper v. Commonwealth.

---

Rudd v. N., C. & St. L. R. R. Co., 7 Ky. L. R., 823 .....	417
Ruffner v. Ridley, 81 Ky., 166.....	156
Rutherford v. Clark, 4 Bush, 27.....	777
Ruttles v. Covington, City of, 10 Ky. Law Rep., 766; (10 S. W., 644) .....	669
Safety Bldg. & L. Assn., v. Price, 41 Atl., 53.....	107
Safety Bldg. & L. Co. v. Ecklar, 20 Ky. Law Rep., 1770; (50 S. W., 50) .....	293
Saint Louis, City of, v. Gurno, 12 Mo., 414.....	355
Salisbury v. Commonwealth, 79 Ky., 432.....	219
Sanger v. Nightingale, 122 U. S., 176; (7 Sup. Ct., 1109).....	807
Sawyer v. Prickett, 86 U. S., 146.....	185
Saylor v. Commonwealth, (30 S. W., 391).....	221
Sayre v. Association, 1 Duv., 143; (85 Am. Dec., 613).....	877
Schmidt v. L., C. & L. R. R. Co., 99 Ky., 143; (35 S. W., 135; 36 S. W., 168) .....	800
Schulten v. Brewing Co., 96 Ky., 224; (28 S. W., 504).....	889
Seitz v. Brewers' Refrigerating Machine Co., 141 U. S., 510; (12 Sup. Ct., 46).....	718
Semmes v. Semmes, 7 Har. & J., 388.....	650
Sharp v. White, 1 J. J. Mar., 106.....	184
Shawneetown, City of, v. Mason, 82 Ill., 337; 25 Am. Rep., 321....	352
Sheehy v. Railway Co., 94 Mo., 574; (4 Am. St. Rep., 396; 7 S. W., 579) .....	348
Sherman Town Center Co. v. Morris, (19 Am. St. Rep., 134); 23 Pac., 569.....	29
Showalter v. Simmons, 5 Ky. Law Rep., 423.....	797
Shultz v. Beatty, 6 Ky. Law Rep., 662.....	797
Simpson v. Building Assn. 19 Ky. Law Rep., 1176; (41 S. W., 570; 42 S. W., 834) .....	110, 117
Sloux City Terminal R. Co. v. Trust Co. of N. Am., 27 C. C. A., 73; 82 Fed. Rep., 138.....	13
Smith v. Gowdy, 8 Allen, 566.....	664
Smith v. Gower, 2 Duv., 19.....	175
Smith v. St. Paul R. R. Co., (62 N. W., 392) .....	458
Sniders' Sons Co. v. Troy, 91 Ala., 234; (24 Am. St. Rep., 887); 8 South, 658 .....	844
Sously v. Burns' Admr., 10 Bush, 87.....	666
Stack Case, 85 Ill., 377; 28 Am. Rep., 619 .....	353
Stamper v. Commonwealth, 19 Ky. Law Rep., 1014; (42 S. W., 915) .....	41

---

 Standard Oil Co. v. Tierney. Toledo A. A. Ry. Co. v. Penn Co.
 

---

Standard Oil Co. v. Tierney, 96 Ky., 89; 16 Ky. Law Rep., 327; (27 S. W., 983) .....	48
State v. The Bank of Commerce, 95 Tenn., 222; (31 S. W., 993) ..	453
State v. Hammer, 42 N. J. L., 435 .....	123
State v. Hilmantel, 21 Wis., 566 .....	333
State v. Parsons, 40 N. J. L., 17 .....	122
State v. Phipps, 50 Kan., 609; (34 Am. St. Rep., 152); 31 Pac., 1097 .....	877
State v. Sandford, 1 Nott. & Mc., 512 .....	227
State v. Swepson, 79 N. C., 632 .....	917
Steamboat Co. v. McCutcheon, 13 Pa. St., 13 .....	29
Steamship Co. v. McGregor, 21 Q. B. Div., 549 .....	883
Stewart v. Commonwealth, 2 Ky. Law Rep., 386 .....	895
Stewart v. Dougherty, 3 Dana, 479 .....	154
Stofer, &c., v. United States Bldg. & L. Assn., 20 Ky. Law Rep., 1720; (50 S. W., —) .....	293
Story v. Railroad Co., 90 N. Y., 122; 43 Am. Rep., 146 .....	356
Stowers v. Postal Tel. Cable Co., (24 Am. St. Rep., 290); 9 South, 356 .....	670
Stratton v. McMakin, 84 Ky., 641; (4 Am. St. Rep., 215) .....	706
Starrs' Case, 117 N. C., 314; (53 Am. St. Rep., 585; 23 S. E., 450) .....	112
Summers v. Sprigg, 16 Ky. Law Rep., 206; (35 S. W., 1033) .....	277
Sumrall v. Commercial Bldg. Tr. Co's Assignee, 20 Ky. Law Rep., 1801; (50 S. W., 69) .....	293
Swords v. Owens, 43 How. Pr., 176 .....	477
Taft, Trustee, v. Hartford R. R. Co., 8 R. I., 310 .....	269
Talbott's Heirs v. Talbott's Heirs, 17 B. M., 1 .....	76
Tate v. Hawkins, 81 Ky., 578; 50 Am. Rep., 181 .....	805
Taylor v. Commonwealth, 3 Ky. Law Rep., 783 .....	895
Taylor's Admr. v. Taylor's Assignee, 78 Ky., 471 .....	585
Texas Midland R. R. Co. v. Sullivan, (48 S. W., 598) .....	459
Thackston v. Watson, 84 Ky., 206 .....	310
Thomas v. Arthur, 7 Bush, 245 .....	319
Thomas v. Thomas, 15 B. M., 184 .....	516
Thomasson v. Townsend, 10 Bush, 114 .....	233
Thompson v. Commonwealth, 20 Ky. Law Rep., 397; (45 S. W., 1039; 46 S. W., 492, 698.) .....	41, 603
Thorington v. Smith, 8 Wall., 9 .....	92
Thunder Bay Booming Co. v. Speechly, 31 Mich., 336; 18 Am. Rep., 184 .....	564
Todd v. Edwards, 7 Bush, 89 .....	710
Toledo A. A. & N. M. Ry. Co. v. Penn. Co., 54 Fed. Rep., 738 .....	886



## Towle v. Building &amp; L. Co.    Whittacre v. Fuller.

Towle v. Building & L. Co., 78 Fed. Rep., 688.....	295
Trabue v. McAdams, 8 Bush, 75.....	495
Treat v. Lord, 42 Me., 552; (66 Am. Dec., 298).....	563
Trowbridge v. Hamilton, 52 Pac., 328.....	272
Turner v. Johnson, 18 Ky. Law Rep., 202; (31 S. W., 1028).....	464
Turner v. Navigation Co., 2 Dev. Eq., 239.....	185
Union & Planters' Bank v. Memphis, City of, (46 S. W., 557)....	453
United States v. Addystone Pipe & Steel Co., 29 C. C. A., 141; 85 Fed. Rep., 278.....	385
United States v. McKee, 4 Dill., 128.....	909
United States v. Wilson, 7 Pet., 150.....	823
Usher v. Flood, 12 Ky. Law Rep., 721; (17 S. W., 132).....	516
Vannoy v. Patton, 5 B. M., 248 .....	846
Vanmeter v. Spurrier, 94 Ky., 22; (21 S. W., 337).....	477, 846
Vanmeter v. Vanmeter's Assignee, 12 Ky. Law Rep., 214; (13 S. W., 924) .....	277
Varden v. Mount, 78 Ky., 86; 39 Am. Rep., 208 .....	86
Vroom v. VanHorne, 10 Paige, 549; (42 Am. Dec., 94).....	779
Walker v. Commonwealth, 8 Bush, 96.....	219
Walston v. Commonwealth, 16 B. M., 15.....	223
Ware v. Bennett, 18 Tex., 794 .....	810
Warfield v. Davis, 14 B. M., 33.....	800
Warren v. Martin, 11 How., 224.....	417
Washington, Alex. & Georgetown Steam Packet Co. v. Sickles, 24 How., 333 .....	723
Waters v. Mattingly, 1 Bibb, 244; (4 Am. Dec., 631) .....	153
Walston v. Christian, 12 Bush, 524 .....	191
Webb v. Wright, 2 Bush, 126 .....	109
Weir v. Granite Street Prov. Assn., 38 Atl., 643 .....	112
Weisert v. Muehl, 81 Ky., 339 .....	597
Welch v. Welch, 19 Ky. Law Rep., 1945; (44 S. W., 960) .....	407
Wellford v. Snyder, 137 U. S., 521; 11 Sup. Ct., 183 .....	308
Werth v. Springfield, City of, 78 Mo., 107 .....	355
Western U. Tel. Co. v. Norman, 77 Fed. Rep., 27 .....	171
Western U. Tel. Co. v. Williams, 86 Va., 696; (19 Am. St. Rep., 908; 11 S. E., 106) .....	670
Westhead v. Sproson, 6 Hurl. & N., 728 .....	657
Wheeler v. N. B. R. R. Co., 115 U. S., 34; 5 Sup. Ct., 1061; 1160..	669
Wheeler & Wilson Mfg. Co. v. Howard, 28 Fed. Rep., 741 .....	545
White v. Ewing, 16 C. C. A., 296; 69 Fed. Rep., 451 .....	162
Whitehead v. Root, 2 Met., 538 .....	184
Whitney Arms Co. v. Barlow, 63 N. Y., 62; 20 Am. Rep., 504 ....	29
Whittacre v. Fuller, 5 Minn., 508 .....	810

---

Wight v. Shelby R. R. Co. Zable v. Baptist Orphans' Home.

---

Wight v. Shelby Railroad Co., 16 B. M., 7; 63 Am. Dec., 522, 384, 844	
Williams v. Maxwell, (31 S. E., 821) .....	112
Williams v. Railway Co., 41 Fed. Rep., 556 .....	340
Williams v. Rogers, 14 Bush, 788 .....	585
Williamson's hrs. v. Johnson's hrs., 4 T. B. Mon., 253 .....	666
Wills v. Wills, 85 Ky., 492; (3 S. W., 902) .....	304
Wilmington & W. R. Co. v. Alsbrook, 146 U. S., 279, 302; 12 Sup.	
Ct. 72 .....	445
Willmoth v. Hensel, 151 Pa. St., 200; 25 Atl., 86 .....	256
Wilson v. Com., 3 Bush, 105 .....	527
Wilson v. Robertson, 7 J. J. Mar., 78 .....	92
Witherspoon v. Musselman, 14 Bush, 214; 29 Am. Rep., 404 .....	233
Wood v. Armstrong, 54 Ala., 150; 25 Am. Rep., 671 .....	476
Wood v. Wood, 78 Ky., 629 .....	156
Woodbury v. Turner & Woolworth Mfg. Co., 96 Ky., 461; (29 S.	
W., 295) .....	783
Woodring v. White, 12 Ky. L. Rep., 505 .....	587
Woodson, &c., v. Bank of Gallipolis, The, 4 B. M., 203 .....	429
Worth v. Smith, 5 B. M., 505 .....	409
Wyatt v. Com., (1 S. W., 196) .....	224
Yocum v. Foreman, 14 Bush, 494 .....	250
Youse v. Forman, 5 Bush, 337 .....	650
Zable v. Baptist Orphans' Home 92 Ky., 89; (17 S. W., 212) .....	732

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DECISIONS.  
OF THE  
Kentucky Court of Appeals.

JANUARY TERM, 1899.

CASE 1—SETTLEMENT OF ASSIGNED ESTATE—MARCH 4, 1899.

McNamara, Etc. v. Schwaniger.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. **STATUTES, CONSTRUCTION OF.**—The act of March 16, 1894, regulating assignments for the benefit of creditors, was properly held by the court below applicable to assignments made before the passage of the act, it appearing that it was the intention of the Legislature to apply the procedure to assignments theretofore made as well as those thereafter to be made.
2. **SAME.**—Section 93 of the Kentucky Statutes, providing for a confirmation of the assignee's report of settlement at the second term of the county court after the same has been made, is not self-enforcing, and an order of court is necessary before such report of settlement stands confirmed. Until such order is made the report stands open for exceptions upon showing cause or reasonable excuse for failing to except before the second term.
3. **EXEMPTIONS—HOMESTEAD.**—A party entitled to a homestead in money out of realty not divisible is entitled to the entire amount of one thousand dollars and the assignor has no right to deduct from that amount any sum due him from the assignor for rent of the assigned property.
4. **ASSIGNMENTS FOR THE BENEFIT OF CREDITORS—EXCESSIVE ALLOWANCE.**—Where the service rendered by the assignee for the benefit of creditors consisted in a sale of a single piece of real

McNamara, Assignee, &c., v. Schwaniger.

estate and thirty shares of stock in a building and loan association in one lot, an allowance of \$275 to the assignee for his services, and of \$250 to his attorney was excessive. A reduction of one hundred dollars in each allowance would make the allowance to attorney and assignee reasonable.

5. **APPEALS—ADJUSTMENT OF EQUITIES ARISING BY BALANCING ERRORS.**—An error of \$200 in the claim of the assignee against the assignor for rent of the assigned premises will be paid to the assignor out of the reduction in the allowances to the assignee and his attorney.
6. **APPEALS—PARTIES.**—The error complained of that the value of the potential right of dower of the assignor's wife was not estimated and paid to her will not be considered, she not being a party to the appeal.

**H. M. WOODFORD FOR THE APPELLANT.**

1. It was a reversible error on the part of the circuit court to refuse, as it did, to refer the case *de novo* to the Master Commissioner to take proof in order to have a more complete presentation of the facts, and a better preparation of the case, the court overruling motion of defendant and appellant, to which exception was taken at the time.
2. It was also a reversible error for the circuit court in this case on appeal to disregard section 88 of the Kentucky Statutes, and fail or refuse to certify its judgment to the county court or to make an order directing the county judge or court what order to have entered in the case.
3. Schwaniger never had the face or courage to resist the collection of the \$200 rent on store which he had agreed to pay and which was a very low rent for the store part of the building, with all the fixtures and bakery included, until after he had fallen out with his assignee and sought the advice of attorney long after the making of the settlement.
4. As to motion and exceptions of the Chiles, Thompson & Co. debt, and reducing it to \$12 from about \$85, this was merely a clerical error and corrected on the face of the record.

**J. J. CORNELISON FOR THE APPELLEE.**

1. The assignor, Schwaniger, was entitled to the payment of his homestead in full.
2. The assignee, McNamara, was not entitled to collect the rent



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McNamara, Assignee, &c., v. Schwaniger.

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- from the appellee after he had made a settlement in which he was not charged with it. Further, the appellee was not liable for rent of the property until his homestead had been assigned.
3. The allowance to the assignee for a credit of \$3,208.05 as having been paid to the building and loan association is erroneous; he should only have had credit for \$2,843.25. The allowances to the assignee and to his attorney were excessive.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

On August 31, 1893, the appellee made a deed of assignment to appellant of all his property for the benefit of his creditors; reserving to himself in the deed his homestead, and all his exemptions as a person with a family, under the exemption laws of the State. The whole of the assigned estate consisted of a three-story brick house and lot in Mt. Sterling, and a small stock of merchandise, which was appraised at \$282.20. The appraisers found that Schwaniger's family consisted of eight persons, and that he had not sufficient provisions, etc., to sustain his family for one year, and set apart to him the whole of the inventory of personal property, amounting to \$282.20, and, the real property being indivisible, allowed him a homestead of \$1,000 in money, to be paid out of the proceeds. The real estate was incumbered by a mortgage to the National Home Building & Loan Association, and appellee was the owner of forty shares of stock therein, thirty of which were pledged as additional security for the mortgage. By agreement, the real estate was sold, free of lien and dower, together with the building association stock, in one lot, and appellant paid off the mortgage thereon. Creditors of the estate were duly advertised for, and on May 16, 1895, what was called a "final settlement" was made by the judge of the county court; the paper reciting that he "proceeded to finally settle and audit the accounts of P. McNamara, assignee of F. Schwaniger."

After the passage of the act of March 16, 1894, found in chapter 7 of the Kentucky Statutes, there appears to have been an effort to conform the proceedings, as nearly as might be, to the requirements of that act; and this, indeed, was proper, as the act appears to have been intended to apply to the procedure in assignments theretofore as well as thereafter made. The settlement with the county judge appears to have been intended to conform to section 93, Kentucky Statutes, for it appears to be conceded by counsel for appellee, though it does not appear in the record, that notice was published in a newspaper of the proposed application for a discharge. And here arises the first question for decision; it being claimed for appellant that section 78 applies, which provides that "an assignee may resign his trust upon settling his accounts, and the settlement shall be confirmed and the assignee discharged from liability at the second regular term of the court after the settlement has been filed, if no exceptions are filed thereto; if exceptions are filed, they shall be heard and determined by the court,"—and that, as no exceptions were filed at the second regular term of the court after the filing of this settlement, it became confirmed, as matter of law, and the assignee was discharged. A careful examination of the whole statute has led us to the conclusion that a very material change has been made by it in the procedure in respect to this subject. The county judge, as such, appears no longer to have anything to do with the settlement. Every thing to be done by him under the present act is done as the county court.

By section 91 provision is made for the assignee's administering oaths, examining witnesses touching claims, and allowing or refusing to allow any claim or part thereof. It is further provided

that at stated intervals he shall file in the county court "a list of all claims presented to him, including those allowed, as well as those not allowed, with his reasons for refusing to allow them; and at the second regular term of the court held thereafter the report shall be confirmed, unless exceptions are filed thereto." We think the utmost effect that can be given to the settlement of May 16, 1895, is to consider it as a report under section 91; and, while it is true that no exceptions were filed at the second regular term after its filing, on the other hand there was no order confirming it. This, under the present statute, we consider essential to its finality. All the reports required by this chapter are made to the county court; and, while the statute says that, if no exceptions are filed within the prescribed time, they shall be confirmed, that necessarily means shall be confirmed by order of court. If not so confirmed by order of court, they remain open, and any party or creditor, though behind time, may, upon showing cause and reasonable excuse, be permitted to file exceptions, as was done in this case; and the county court, in our opinion, properly permitted the exceptions to be filed.

Exceptions were filed upon the ground that appellant had only paid to appellee the sum of \$800 for his homestead, and were sustained by the judgment of the county court. Appellant contended that after the assignment the appellee became indebted to him in the sum of \$200 for rent of the business part of the assigned property, and, after the sale of the lot, undertook to collect it by retaining it out of the money allowed appellee in lieu of homestead. The county court held—and properly—that this could not be done. A homestead allowed him in land would have been exempt from his debts, but no more ex-

empt than the money allowed him in lieu of homestead. Moreover, as the county court said, the rent claimed was about offset by the payments of appellee to the building and loan association on the mortgage debt after the assignment. An appeal was taken to the circuit court, and a judgment of affirmance had there, from which judgment an appeal has been taken to this court. There is also here a cross appeal by Schwaniger.

Appellant's contentions have been heretofore stated.

An injustice was worked against appellant by the settlement of May 16, 1895, in that it prorated the entire assets among the creditors, and appellant proceeded to pay them; and afterwards the judgment of the county court required him to pay an additional \$200, for the payment of which out of the estate no provision was made. The settlement, however, allowed the assignee \$275 for his services, and \$250 for the services of his attorney, each of which allowances is, in our opinion, manifestly excessive for the services rendered in this case; there being only two items of property to dispose of—the real estate and building and loan stock, which were sold in one lot. If these allowances were each reduced \$100, they would be about the proper size.

It appears, therefore, that there was no error to the prejudice of any substantial right of appellant.

Upon the cross appeal of Schwaniger there is little of importance to be considered. His complaint of the excessive allowance to the assignee and counsel is offset by the allowance of \$200 to him, which necessarily comes out of those allowances. His complaint that the value of his wife's potential right of dower was not estimated and paid to her, though, according to his claim, her signature to the deed was obtained by a promise that it should be done,

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

can not avail, because Mrs. Schwaniger is not a party to the record. The other errors complained of on the cross appeal are immaterial. For the reasons stated, the judgment is affirmed upon the original appeal and the cross appeal.

CASE 2—LIQUIDATION OF AFFAIRS OF INSOLVENT CORPORATION—MARCH 8.

Bell & Coggeshall Co., The, Etc. v. Kentucky Glass Works Co., Etc.

106	7
1126	174

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

(ON REHEARING.)

1. CORPORATIONS—POWER TO MORTGAGE.—A power to mortgage corporate property is necessarily implied in the power to contract debts.
2. SAME—MORTGAGE BY EXECUTIVE OFFICER.—A mortgage of corporate property by the executive officers to whom the general management of corporate affairs was intrusted by the articles of association and exercised for a long period by general acquiescence, can not be held invalid on account of the failure of the corporation to formally authorize it.
3. SAME—INDEBTEDNESS IN EXCESS OF CHARTER LIMIT.—As against other corporate creditors a mortgagee of corporate property will not be permitted to enforce his mortgage for an amount in excess of that named in the articles of association as the limit of corporate indebtedness.
4. WAREHOUSE RECEIPTS.—A warehouse receipt issued by a manufacturing corporation for articles recited to be in its warehouse, and used by it in its ordinary course of business, can not be held to create a valid lien under section 4768 of the Kentucky Statutes.

(On a petition for an extension of the opinion, the court held the following points:)

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

5. APPLICATION OF PAYMENTS MADE BY ASSIGNOR BEFORE ASSIGNMENT.—Where a bank held a mortgage of corporate property valid as to other creditors to the extent the corporation could legally create a debt and invalid as to the excess, general payments made by the assignor prior to the assignment will be credited on the unsecured indebtedness, the entire claim being valid as to the assignor itself.
6. SAME.—Payments made by the assignee after assignment in such a case will be credited on the secured debt.

ROBT. J. ELLIOTT IN AN ORIGINAL BRIEF FOR APPELLANTS, AND IN RESPONSE TO APPELLEE'S PETITION FOR A REHEARING.

1. The mortgage for \$48,600 by the Kentucky Glass Works Company to the Kentucky National Bank, dated November 20, 1885, but not lodged for record until August 26, 1886, was and is illegal and void. It was fraudulently executed and delivered and put to record for a fraudulent purpose and with the fraudulent intent on the part both of the Glass Works Company and said bank to hinder, delay and defraud those who were then and those who should thereafter become *bona fide* creditors of said Glass Works Company; and said bank so fraudulently asked for, demanded and took and caused said mortgage to be recorded.
2. Each of the warehouse receipts, numbers 7, 13, 17, mentioned in the pleadings, was without any valuable and good consideration, illegally and fraudulently issued and fraudulently delivered to Ed. Bull by the Kentucky Glass Works Company for a fraudulent purpose and with fraudulent intent, thereby to hinder, delay and defraud the creditors in said Glass Works Company, which facts were then known to the Kentucky National Bank.
3. The deed of assignment, dated April 27, 1887, purporting to have been made by the Kentucky Glass Works Company to T. W. Spindle, as assignee, was fraudulently and without authority executed and delivered by Ed. Bull as president of said company, and was fraudulently and without authority so acknowledged and lodged for record by him. And said alleged deed of assignment was not authorized by law and is invalid. Neither the execution nor delivery nor acknowledgment of said deed for record was done or ratified or authorized by the Kentucky Glass Works Company, and all of said facts were then well known

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

to the president of said company and said alleged deed of assignment is invalid, null and void.

Citations: Thomas v. R. R. Co., 101 U. S., 28; Morawetz on Private Corporations, sections 249, 316, 343, 346, 395, 408, 479, 512, 513, 580, 591, 606, 607, 619, 620, 622, 641, 642, 643, 644, 645, 648, 649, 686, 708, 815, 1048, 1054; Green's Brice's Ultra Vires, 81, 2d. Am. Ed.; Gen. Stat., ch. 44, art. 1, sec. 1; Burrell on Assignments, secs. 79, 87, 476, 501, 507; Hieronymous, &c., v. Mayhall, 1 Bush, 510; Foster v. Grigsby, 1 Bush, 97; Lowry v. Fisher, 2 Bush 76; Murphy v. City of Louisville, 9 Bush, 193; Douglass v. Cline, 12 Bush, 608; Bartlett v. Borden, 13 Bush, 47; Griffith v. Cox, 79 Ky., 562; Little v. Ragan, &c., 83 Ky., 325; Haskell v. Wynne, &c., 3 Ky. Law Rep., 54; Ward v. Trotter, 3 Mon., 3; Byrd v. Bradley, 2 B. M., 239; Bank of U. S. v. Huth, 4 B. M., 530; Bowling v. Winslow's Admr., 5 B. M., 31; Trimble v. Ratcliff, 9 B. M., 518; Baker v. Dobbys, 4 Dana, 225; Vernon v. Morton, 8 Dana, 263; Bucklin v. Thompson, 1 J. J. M., 226; Breckinridge v. Churchill, 3 J. J. M., 13; Maiders v. Culver's Assg., 1 Duv., 166; Lyne v. Bank of Louisville, 5 J. J. M., 554; Dougherty v. Kercheval, 1 A. K. M., 53; McGowen v. Hoy, 5 Litt., 243; Weeden v. Hawes, 10 Conn., 50; German Ins. Bank v. Nunes, 80 Ky., 335; Bank of Commerce v. Payne, 10 Ky. Law Rep., 48; York, Assg., v. Ferrell, 14 Ky. Law Rep., 207; Scott v. Strauss, 14 Ky. Law Rep., 892; National Bank v. Matthews, 98 U. S., 624; De Camp v. Alward, 52 Ind., 469; Perkins v. Pike, 42 Me., 149; Smith v. Moore, 26 Ill., 396; McAlmster v. Clopton, Exr., 51 Miss., 261; Hays v. Mercier, 22 Neb., 660; Buell v. Buckingham, 16 Iowa, 290; Ringo v. Biscoe, 13 Ark., 563; Curtis v. Leavitt, 15 N. Y., 9; Hughes v. Ellison, 5 Mo., 463; Loeb v. Pierpoint, &c., 58 Iowa, 469; Fisher v. Murray, 1 E. D. Smith (N. Y.), 341; Tapley v. Butterfield, 1 Met. (Mass.), 517; Deming v. Colt, 3 Sand. (N. Y.), 463; Anderson v. Tompkins, 1 Brock. (N. Y.), 463; Mt. Sterling & Jeff. Tp. Co. v. Looney, 1 Met., 551.

JOHN C. RUSSELL AND GEORGE B. THORNTON FOR THE KENTUCKY NATIONAL BANK.

Counsel discussed *seriatim* the points urged for reversal and cited Morawetz on Private Corporations, secs. 600, 680, 689, 695, 696, 711; National Bank v. Matthews, 98 U. S., 624; Silver Lake Bank v. North, 4 Johnson Chan. Reps., 370.

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

JOHN C. RUSSELL AND HUMPHREY & DAVIE FOR APPELLEE, KENTUCKY NATIONAL BANK, IN A PETITION FOR A REHEARING.

1. The opinion delivered is erroneous in holding the deed and mortgage to be void. Ky. Stats., sec. 542; Thompson on Corps., secs. 6133, 6136, 6179, 6184, 6165, 5318; Pools v. West Point Butter Assn., 30 Fed. Rep., 513; McElroy v. Minnesota Percheron Horse Co., 96 Wis., 317; Central Trust Co. v. Columbus Railroad, 87 Fed. Rep., 815; Cook on Stockholders, (4th ed.), sec. 716 and note; Morawetz on Corps. (2d ed.), secs. 689 to 700; same, secs. 673, 678, 680; Sherman Center Town Co. v. Morris, 19 Am. St. Rep., 134; Sherman Center Town Co. v. Swigert, 19 Am. St. Rep., 137; Sherman Natl. Bank v. Butchers' Hide and Tallow Co., 97 Ky., 40; Natl. Bk. of Cynthiana v. Mattingly & Sona, 18 Ky. Law Rep., 425; Trapp v. Fidelity Natl. Bk., 19 Ky. Law Rep., 1114.
2. The opinion is erroneous in holding that because the indebtedness which the mortgage secures is in excess of \$8,000, limit of the Glass Works' charter, therefore the mortgage to secure it is void in  *toto* , even for the \$8,000. Garrett v. Burlington, 59 Am. St. Rep., 461; Warfield v. Marshall, 2 Am. St. Rep., 263; Thompson on Corps., sec. 5705; Ossipe Hosiery Co. v. Canney, 54 N. H., 55; Wood v. Corey Water Works, 44 Fed. Rep., 146; Allis v. Jones, 45 Fed. Rep., 148; Shermantown Co. v. Morris, 19 Am. St. Rep., 134; Humphrey v. Patrons' Assn., 50 Ia., 607; Jones on Mortgages, sec. 127; Sioux City Terminal v. Trust Co., 82 Fed. Rep., 133; Cook on Stockholders (4th ed.), sec. 760; Hervey v. Illinois R. T., 28 Fed. Rep., 169; Barret v. Pollock, 108 Ala., 390; Alabama Co. v. McKeever, 112 Ala., 134; Antitam Paper Co. v. Chronicle Co., 115 N. C., 143; Bebe v. Richmond Light Co., 3 N. Y. App. Div., 334; Hamilton Co. v. Clemes, 17 N. Y. App. Div., 152; Cook on Stockholders (4th ed.), sec. 708.
3. The opinion is wrong in holding the warehouse receipts to be void. Ky. Stats., sec. 4768; Black's Law. Dict., title "Warehousemen;" Greenbaum v. Megibben, 10 Bush, 419; Cochran & Fulton v. Ripy, 13 Bush, 495; Ray v. Com., 12 Bush, 397; Colebrooke on Collateral Securities, sec. 420; Merchants' Bank v. Hibbard, 48 Mich., 118; Ferguson v. Northern Bank, 14 Bush, 561; Greenbaum v. Burns, 15 Ky. Law Rep., 710; Block v. Oliver, 19 Ky. Law Rep., 1278; Northrop v. First Natl. Bk. of Chicago, 27 Ill. App., 527; Ky. Stats., secs. 4771, 4772, 4773, 4774, 4775.



Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

ROBT. J. ELLIOTT FOR APPELLANTS IN A PETITION FOR AN EXTENSION OF THE OPINION.

(On December 15, 1898, the Court of Appeals in an opinion by Judge Guffy reversed the judgment of the court below. Judge Paynter dissenting.

On March 8, 1899, the former opinion of the court was withdrawn and the following opinion by Judge DuRelle delivered, Judge Guffy dissenting from so much of the opinion as holds the mortgage valid for any purpose. Judge Paynter also dissenting.)

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

The questions presented by this appeal grow out of a contest between the creditors of the Kentucky Glass Works Company, an insolvent corporation. The company was incorporated in 1879 under the general corporation act; it being provided in the articles of incorporation that the general business of the corporation proposed to be transacted is the manufacture of glass in all its forms, and for all the purposes for which it is manufactured. The capital stock was fixed at \$12,000.

By the fourth paragraph it was provided: "The business and affairs of the corporation shall be conducted by the following officers, viz.: A president, a secretary, and a general superintendent; and said officers shall be stockholders, and elected on the last Monday in July of each year, except in the year 1879. The said corporators shall fill said offices until the last Monday in July, 1880, and until their successors are elected regularly under these articles. The office of president, until the first regular election, shall be filled by said Edward Bull; that of secretary, by William Cromey; and that of superintendent, by John Stanger, Sr." By the fifth paragraph it was provided: "The highest amount of indebtedness or liability

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

to which said corporation shall at any one time subject itself shall be \$8,000." The company thereupon engaged in the business of glass-making, and continued it until April 27, 1887, when a deed of assignment was filed for the benefit of its creditors. In September, 1888, the assignee filed his petition for a settlement. There had been a good deal of litigation between the creditors of the corporation, the material evidence in which was considered as evidence in this action. The appellants were authorized to represent, not only their own claims, but the claims of others of like character. The Kentucky National Bank claims under a mortgage for \$48,600 and interest.

This mortgage was dated December 20, 1885, and was recited to be from the Kentucky Glass Works Company, and Ed Bull and Robert F. Bull as stockholders in said company, to the Kentucky National Bank, to secure a previous indebtedness of \$48,600, represented by various notes bearing date at various intervals during the year 1885, and to convey by way of mortgage the land of the Kentucky Glass Works Company, the machinery and plant, goods and wares, and materials for manufacture, with the right, however, in the company to retain possession of and work up the materials, and continue the manufacture of glassware; the proceeds of sales to be applied to the payment of the indebtedness secured by the mortgage. The instrument concludes: "In testimony whereof said parties of the first part have set their hands and seal hereto; and said Kentucky Glass Works Company, by its president, has hereto set its name and affixed its corporate seal, and caused this instrument to be attested by its secretary, the day and year herein first above written. Kentucky Glass

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

Works Company. [Seal.] E. Bull. E. Bull, Pres. Attest: Wm. Cromey, Secretary. R. F. Bull. R. F. Bull, Vice-President."

The first question for decision is whether the mortgage is void for the reason that it was executed without authority from the board of directors.

It will be observed that the articles of incorporation do not provide for any board of directors but commit the entire management of the business of the company to three executive officers. It appears that the company never had a meeting, never adopted any by-laws, and never had an election, but that the president and secretary named in the articles continued to act as president and secretary until after the execution of the mortgage—R. F. Bull being nominally vice-president—and that it had no general superintendent. The stock of the company was owned entirely by Edward Bull and Robert F. Bull, except ten shares belonging to John Bull's estate, of which William Cromey, the secretary, was the trustee up to May following the date of the mortgage, when he ceased to be trustee, or to act as secretary. The person named in the articles of incorporation as general superintendent appears never to have taken stock, or acted in that capacity. The business was managed by the president, who made the contracts, superintended the business, borrowed money, drew checks for it, and attended to all matters of business. The mortgage appears to have been executed because the bank was about to cease extending credit to the company.

Under these circumstances, and with these articles of incorporation before us, can it be justly said that the mortgage was invalid because its execution was not authorized by a board of directors?

*Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.*

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There are numerous authorities to the effect that where a corporation loosely commits all its business affairs to a superintendent or president, and acquiesces in such management for a great length of time, the acts of the corporation through such officers will be held valid to the extent of giving preference after insolvency. Thompson on Corporations, sec. 6179, referring to *Poole v. West Point Butter Association*, 30 Fed. Rep., 513 (opinion by Mr. Justice Brewer).

In *McElroy v. Minnesota Percheron Horse Co.*, 96 Wis., 317 [71 N. W., 652], it was said: "A corporation may so conduct its affairs as to confer by implication upon its president powers much beyond those strictly incident to his office, even to the extent of exercising the entire powers of the corporation, which by the articles are vested solely in the board of directors." In that case it appeared that "the corporation affairs for about five years had been conducted by the president and by his predecessor in office, without any objections or protests whatever by the stockholders or directors, so far as appears from the records. No election of directors by stockholders was had during that time, and no meeting whatever held, except one a few months before the making of the contract, at which the only business transacted was to fill the places of several directors who had resigned, which was done by those who remained."

In *Sherman v. Fitch*, 98 Mass., 59, a mortgage not authorized by a vote of the board was held to be valid as against the assignee, the court there saying: "Such an act by the president and general manager of the business of the corporation, with the knowledge and concurrence of the directors, or with their subsequent and long-continued acquiescence, may properly be regarded as the act of the corporation."

See, also *Eureka Iron Works v. Bresnahan* (Mich.) [27 N. W., 524]; *Gordon v. Preston*, 26 Am. Dec., 75; *Thompson on Corporations*, secs. 6165, 5318.

In the case at bar the entire management of the business of the corporation was intrusted by the articles to the company's executive officers. It can not justly be said that it was necessary that they should have a formal meeting to authorize the action to be taken by them, for executive officers do not act by resolution. The board of directors in a properly managed corporation is a deliberative body. It acts by resolution, and directs what the executive of the corporation shall do. But when the executive is to take action, and acts within the scope of his authority, his acts are binding.

The corporation was undoubtedly authorized to mortgage its property, that power being necessarily implied in the power to contract debts. *Thompson on Corporations*, sec. 6133. That was a part of the business of the corporation, and the executive officers are authorized to transact it.

We conclude, therefore, that the mortgage was not invalid by reason of its execution by the president, secretary and all the stockholders except one, and with the knowledge and concurrence of the trustee of that one.

And this brings us to consider the next question—to what extent, if any, the mortgage was invalid because of its execution for an amount in excess of the liability which the articles of incorporation permit to be incurred.

Were this question between the corporation and the bank, there would be little difficulty. In this case it appears that the money was actually received by the company, and used in its business, and the company would be estopped from refusing to make resti-

tution of that whereof it had received the benefit. The doctrine is thus stated in Thompson on Corporations, sec 5705: "By the *American law*, where there is a statute imposing a limit upon corporations in respect of the amount of debts which they can incur, a creditor who does not know that the limit has been exceeded, and who has no reasonable ground to believe that such is the fact, may enforce the obligation of the contract against the corporation. The true ground upon which this doctrine is based has been already adverted to. It is that, although parties dealing with corporations will be conclusively bound to know the extent of the powers which the statute law has accorded to them, yet where their power to act in a given case depends upon their previous action, which, from its very nature is known only to them, and not to the public dealing with them—in other words where the question is whether their power has been exhausted, and this depends upon a knowledge of antecedent *extrinsic facts*, which knowledge is in the breasts of the corporate officers, and not accessible to the public—then there is an *implied warranty* on the part of the corporation, through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt; so that to allow the corporation to avoid the repayment of the debt on this ground, where it has had and enjoyed the benefit of the contract, would be to allow it to make its own wrong the means of defrauding the innocent public. It is immaterial on what ground the courts which hold that the corporation can not be permitted to repudiate an honest debt upon such a plea place themselves, whether they say that the statute is *directory* merely, or that the corporation is *estopped* from setting up the defense after having *enjoyed the benefit* of the contract—especially where the money borrowed has been used in con-

ducting the legitimate corporate business, with the knowledge and consent of all its officers and stockholders. The judges are in all cases driven to the conclusion by the mere stress of justice."

It would seem, also, from the same section, that even in some cases of municipal obligations the excessive indebtedness may be recovered in a common-law action, as for money had and received.

But as between other creditors and the creditor whose own debt was in excess of the limitation there arises a different question. A creditor whose own debt against the corporation does not transgress the limitation—who does not know, and has no reason to know, that the limitation had been exceeded, has a right to rely upon the "implied warranty on the part of the corporation, through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt." And this reason, it seems to us, applies equally as against the creditor who participated in creating the excessive indebtedness, and was bound to know that it was so doing. The bank was charged with knowledge of the indebtedness limit in the articles of incorporation of the company. In the face of that knowledge, it joined with the company in the creation of an indebtedness against it far in excess of what the company was authorized to incur. The bank knew that the indebtedness was being exceeded; the other creditors did not; and this puts them, in our judgment, upon an entirely different footing.

An immense number of citations have been made by counsel. Most of them are cases between the corporation and the creditor, or between the shareholders and the creditor, in which the corporation or shareholders sought

to evade the payment of the excessive indebtedness on the ground that it was *ultra vires*.

We are well aware, however, that there is quite a respectable number of cases, in which it has not only been held that the excessive indebtedness is enforceable against the mortgagor, but that subsequent creditors stand in no better light than the mortgagor himself. Among them are Central Trust Co. of New York v. Columbus, H. V. & T. Ry. Co., 87 Fed. Rep., 815; Allis v. Jones, 45 Fed. Rep., 148; Sioux City Terminal R. Co. v. Trust Co. of North America, 27 C. C. A. 73, 82 Fed. Rep., 133. Those cases proceed upon the assumption that, in the case of a violation of the statute or charter, as the Legislature imposed no penalties, the court could not do so. "The remedy for the violation of this statute," said the court in the case in 82 Federal Reporter, "is not the destruction of the contracts which evidenced it, but the ouster and dissolution of the corporation, at the suit of the State. The State alone can complain of it and the debtor can not usurp its functions." So, in the case in 87 Federal Reporter, the court, through Judge Lurton, said: "For such a violation of the limits imposed by law upon the power of the coal and railroad company to create indebtedness, the State alone should be heard to complain."

In this Commonwealth such a doctrine would render the inhibition of the statute an absolute dead letter. Of what avail would it be to obtain a judgment of ouster and dissolution of the corporation at the suit of the State, when it could be reincorporated in half an hour's time? What attention would be paid to this inhibition in the statute by persons contracting with corporations, if the only penalty for a violation of the statute were a possible



dissolution of the corporation? Moreover, it is hard to discover what ground the Attorney General would have for hoping to succeed in a suit for ouster and dissolution of a corporation for the offense of making a valid contract.

But it is sufficient to say that this is not the doctrine in Kentucky. In this State it has been adjudged that such a contract, made in violation of law, while enforceable as between the parties, is not enforceable by either participant as against the rights of third persons.

In the case of *First National Bank of Covington v. The D. Kiefer Milling Co.*, 95 Ky., 97 [23 S. W., 675], the indebtedness of the milling company to the First National Bank was far in excess of that allowed by the company's charter. It was held that "a person dealing with a corporation must, at his peril, take notice of the charter or articles of incorporation." Said the court, referring to this excess of indebtedness forbidden by the charter: "Whether, if this was simply a contest between the bank and the milling company, violation and disregard by the latter of the provision of the articles of incorporation would be a sufficient defense, we need not determine; but the enforcement of that provision is demanded by the assignee for the benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused, and in such a case a participant in the fraudulent transaction, not other innocent creditors, should suffer."

While the fraudulent action of an officer of the company, whose embezzlement had rendered the company insolvent, was mentioned in connection with the matter under discussion, the point at issue was not, as counsel seems to suppose, whether the indebtedness of the bank was ren-

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

dered invalid by reason of the fraud of the officer, but, as a glance at the beginning of the paragraph quoted and as the previous paragraph will show, the "unauthorized and illegal dealing" referred to was unauthorized and illegal because in violation of the company's charter. That was the ground upon which the cause was decided, and that is the law of this State.

We do not for a moment controvert the proposition so vigorously and so frequently insisted on by counsel, that in equity neither party to an *ultra vires* transaction will be heard to allege its invalidity while retaining its fruits. What we hold is that neither of the participants in a contract forbidden by law is in as good a position as a third person not so participating.

Nor is it any answer to this proposition to say that the other creditors "had full notice of record of the existence of the bank's debt and of the bank's mortgage, and, if they and the bank are to be held to have constructive notice of the limitation to \$8,000 of debt in the glass works charter, then appellants also knew that the company had no power to create any other debts at the time they created theirs." There is no similarity between the knowledge of charter limitations, with which a person dealing with a corporation is charged, and the constructive notice given by virtue of the registration laws. They are based upon entirely different theories. A corporation exercises a delegated power. Its very existence is an emanation of sovereignty. Independent of the fact that its articles are accessible in the county clerk's office or in the office of the Secretary of State, every one dealing with it is bound, at his peril, to know the limitations of its powers, just as a person dealing with an agent must, at his peril, ascertain the ex-

tent of the agent's authority. On the other hand, the theory of the registration act is not to give notice of the existence of indebtedness against a person whose mortgage has been recorded. The record is not intended to give actual notice of anything. If a person dealing with a mortgagor has *actual* notice of an unrecorded mortgage, he is bound by that knowledge, and as to him there is not the slightest necessity for recording it. So, a person trading with a corporation whose mortgage to another has been recorded is not in any wise chargeable with notice of the mortgage, and still less, if possible, with notice of the amount of debt thereby secured. If he should take a second mortgage upon the incumbered property, he would be chargeable, not with *actual* notice of either the mortgage or the debt secured by it, but would be chargeable with *constructive* notice of the fact that *that particular property* had been incumbered; and this constructive notice would operate to the extent—and no further—of giving the previously recorded mortgage priority over his. The record of a mortgage gives no *actual* notice of anything whatever. In dealing with a corporation, as with a natural person, the party has a right to ignore the record and take his chances in the trade. As matter of course, if he does so the constructive notice of the record will give to the recorded mortgage priority over his debt as to the incumbered property. But the record was not intended to give actual notice of either the existence of the mortgage, or the amount of the debt secured by it, but only to give a constructive notice of the fact that the property was incumbered, which constructive notice would give priority to that mortgage over all persons acquiring subsequent liens upon that property. If it were shown that these appellants had examined the record, and had actual knowledge

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

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of the terms of the instrument, they would be chargeable with actual knowledge of whatever it showed, just as they would if it had been shown them on the street.

The mortgage was legal, and should be upheld. To the extent the claim secured by it was legal, it should be upheld. As to the amount in excess of the legal indebtedness, the creditor is entitled, not to enforce its contract, but, as between it and the company, to restitution in an action for the money had and received.

It appears that the company desired to buy a Cohansey bottle-grinding machine; and, not having money enough, it procured an advance of \$625 for that purpose from the Kentucky National Bank, and, to secure it, gave the bank what is, in form, a warehouse receipt, reciting that it had been received "in our mill-house." It needed soda-ash for use in its business, obtained from the bank an advance of \$650, to pay for twenty-nine barrels of ash, and issued another warehouse receipt, reciting that the soda-ash was "received in our mixing-house, at corner Fourth and C streets." And to secure an advance of \$850 it gave the bank another warehouse receipt on two hundred gross quart, standard fruit-jars, recited to have been "received in our warehouse No. 1, at corner Fourth and C streets." The validity of these receipts is called in question.

While the argument of counsel for appellees upon this subject is exceedingly plausible, and the statute (Kentucky Statute, section 4768), as well as some authorities cited, lends seeming force to it, it can not be that the statute was intended by the Legislature to receive a construction such as that contended for. Such a construction would utterly abrogate the registration laws as to personalty, and would enable a man to pledge the piano in his parlor, or the furniture in his room, by a secret pocket lien, not required to be registered.

The machine here pledged was intended to be used in the business, was deposited in the mill-house, and doubtless used. The soda-ash was bought for use in the business, and placed in the mixing-house. The jars were part of the stock of the concern. We are unable to see that, in any just sense, they were received in store, within the meaning of the statute.

It results, therefore, that the rehearing is granted, and that the judgment must be reversed and the cause remanded, with directions to adjudge to the Kentucky National Bank a prior lien upon the property to the extent of \$8,000, and no more, to adjudge the warehouse receipts to be null and void, and to adjudge the appellants entitled to a *pro rata* distribution of the remaining assets, and for further proceedings consistent herewith.

The whole court sitting.

JUDGE PAYNTER DISSENTS.

JUDGE GUFFY DISSENTS FROM SO MUCH OF THE OPINION AS HOLDS THE MORTGAGE VALID FOR ANY PURPOSE.

JUDGE DURELLE DELIVERED THE FOLLOWING RESPONSE TO PETITION FOR EXTENSION OF THE OPINION.

The petition for extension of the opinion presents certain questions, the decision of which is rendered necessary by the last opinion.

The question of the validity of the assignment was litigated between the assignee and one of the parties appellant, decided in the affirmative, and the decision affirmed on appeal. We are of opinion, under all the circumstances of this case, that the assignment was valid.

It is urged that, the assignee having made payments to the Kentucky National Bank since the estate came into his hands, those payments should be applied to the

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

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reduction of the indebtedness to secure which we have held that the bank had a valid mortgage; and this contention, we are satisfied, is correct. Those payments were made by the assignee after the estate came into his hands for the purpose of being administered and distributed to the creditors of the assignor, with due regard to their priorities. It is not to be presumed, therefore, that the assignee made any payment upon any claim to any creditor, except in the order in which such claim was entitled to payment out of the fund in his hands as assignee. Payments otherwise made, unless the estate proved sufficient to pay all claims of higher grade, would have been illegal, and the assignee would not have been entitled to credit therefor. But being presumed to have been made on the claim with respect to which the bank was entitled to priority, those payments must be applied to the reduction of that claim, viz., the \$8,000 held to be secured by the mortgage; and the assignee is therefore entitled to credit for those payments in the settlement of his accounts.

An entirely different question is presented as to the payments made to the bank by the glass works company prior to the assignment. In the opinion we have held that as between the parties to the transaction, viz., the bank and the glass works company, the bank had a cause of action for the entire amount advanced by it. There were therefore two claims of the bank to which the payments might have been applied. Clearly, neither party to the transaction made any specific application of the payments; for it is evident that neither of the immediate parties regarded the bank's claim as other than a single claim, all of which was of the same dignity.

The court, therefore, will apply the undirected payments, following the rule in this State, which is that, where

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

neither debtor nor creditor applies the payment, equity will apply it to the debt which is unsecured, in preference to applying it to the one which is secured. *Burks et ux. v. Albert*, 4 J. J. Marsh., 97, and 20 Am. Dec., 209. To the extent indicated, the opinion is extended.

DISSENTING OPINION BY JUDGE PAYNTER.

The glass works company discounted at various times notes at the Kentucky National Bank, in the aggregate amounting to about \$48,000. On November 20, 1885, it, having failed to pay its notes at maturity, executed a mortgage to the bank on certain real estate to secure the total of the indebtedness to the bank. Desiring to buy a Cohansey bottle grinder, and not having money to pay the full amount of the purchase price, it procured at the Kentucky National Bank an advance of \$625 for that purpose, and to secure which it gave the bank what the parties called a "warehouse receipt" on the machine. This was in 1887. Needing soda ash for use in the manufacture of glass, the Kentucky National Bank advanced to it \$650 to pay for twenty-nine barrels of ash, and upon which was issued another warehouse receipt. The Kentucky National Bank, also, in 1887, advanced the glass works company \$850, to secure which the company gave the bank a warehouse receipt on two hundred gross of quart jars. In —, 1887, the glass works company was indebted to Bridgeford & Co. Bridgeford & Co. brought suit upon their claim, and obtained an attachment against the property of the glass works company. Thereupon, under the advice of counsel, the glass works company made an assignment for the benefit of creditors. In the Bridgeford & Co. action, upon the hearing, the court discharged the attachment. In the meantime the assignee brought suit to settle the trust es-

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

tate, and appellants, creditors of the glass company, filed their answers, in which certain defenses are interposed.

It is contended that the assignment was made to defraud creditors; that the glass company is a corporation organized under the General Statutes of Kentucky, with a capital stock of \$12,000, with a provision in its articles of incorporation that the indebtedness to which the corporation was authorized to subject itself should not exceed \$8,000; and that the debts of the bank, which exceeded \$8,000, were not enforceable, because of the provision mentioned.

There is nothing in the statute which declares that, if the corporation incurs or creates an indebtedness in excess of that which is authorized, the contract is void. Neither is there anything in the articles of incorporation which so declares. The money was received by the corporation, and used in its business. Some of the assets which were assigned were acquired by the money which it obtained from the bank. There is no evidence that the bank knew that the authority of the glass works company was limited in the matter of contracting an indebtedness.

The record shows that the bank advanced money to the company in the utmost good faith. When a corporation enters into a contract in violation of its charter, either party is allowed to withdraw from it, so long as a rescission can be effected without injustice. When one party has performed the contract, public policy can be best conserved by compelling the other party to make compensation for a failure to perform the obligations imposed by the contract. When money has been borrowed, as in this case, common honesty demands that the borrower be adjudged to pay it. The corporation received the money borrowed; hence, the stockholders necessarily enjoyed the benefit of it. The corporation having received and retained the money, nei-



ther it nor its creditors can be heard to question its authority to borrow the money. It may be said here that the glass works company, or its shareholders, do not deny its liability to the bank for the sums borrowed. The complaint is from its creditors, most if not all of whose debts were contracted after the mortgage had been executed to the bank. If a debtor can not plead that the debt was contracted in violation of a law, and thus defeat its enforcement, the creditors of the debtor can not do so. If the debts due the bank are valid, then it follows that the mortgage executed to secure it should be enforced. To allow a corporation to borrow money and use it for its benefit, and to defeat an action to recover it on the ground that it exceeded its authority in borrowing it, is placing a premium upon dishonesty. Public policy will not justify such an injustice. Morawetz on Private Corporations (sec. 680 says, "That a provision in a charter prohibiting it from creating an indebtedness in excess of a certain amount does not render debts incurred in excess of that amount null and void, by force of the legislative act, unless this be the plain meaning of the provision."

The same authority says in section 685: "It seems but reasonable that a contract which is forbidden by law, and which may subject the company making it to the penalty of dissolution, should not be held obligatory, except for strong reasons of equity. Either party should be allowed to withdraw, so long as a rescission can be effected without injustice. Accordingly it has been held that a contract entered into by a corporation in excess of its charter may be avoided by either party so long as it remains unexecuted by both parties."

It is said in section 688: "A court of equity will even decree the specific performance of a contract entered into

*Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.*

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by a corporation in violation of its charter, if relief of that character is required in order to protect the rights of a party who dealt with the company in good faith and without notice."

In section 689 of the same authority the following language is used: "If a contract is made by a corporation in excess of its chartered powers, either party to the contract may withdraw, so long as a rescission can be effected without injustice; but after a contract of this character has been performed by either of the parties, the requirements of public policy can best be satisfied by compelling the other party to make compensation for a failure to perform the agreement on his side."

In section 695 this doctrine is announced: That, when money is borrowed or loaned by the corporation in violation of an express prohibition in its charter, the contract may be enforced.

Sedgwick on Construction of Statutory and Constitutional Law (p. 73), says: "Where it is simply a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement can not be permitted, in an action founded on it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

In *Auerbach v. Mill Co.*, 28 Minn., 291 [41 Am. Rep., 285, 9 N. W., 801], it was held "that when an unauthorized contract has been executed by a corporation, and it has reaped the benefit of it, public policy does not require the courts to refuse to administer justice between the parties in accordance with the plain principles of law. In such a case the remedy for the violation by the corporation of its charter power lies elsewhere."

We are here seeking to administer justice as between these contracting parties. If justice did not demand the application of other principles of law, the defense of *ultra vires* might be sufficient, but the doctrine of estoppel, as a principle of law, is as positive and well-recognized as is the law that a corporation may not exceed its corporate power; and, although the defendant exceeded its authority, it should be denied the right to assert the fact of its own wrong, when to allow its plea would work injustice and wrong to a party who has been misled by its acts performed within the general scope of its power.

In *Manufacturing Co. v. Canney*, 54 N. H., 295, it was said: "In this case the statute under which the corporation was organized, forbidding the corporation to contract debts or incur liabilities to exceed one-half of its capital stock actually paid in and unimpaired, and of its other property and assets, is directory. Debts contracted and liabilities incurred in excess of that amount are binding upon the corporation." *Garrett v. Plow Co.*, 70 Iowa, 697 [59 Am. Rep., 461, 29 N. W., 395], held that the debt of a corporation beyond the limit prescribed by its charter is not invalid, but enforceable.

In *Steamboat Co. v. McCutcheon*, 13 Pa. St., 13, a corporation had taken a lease of real estate without authority in its charter, and in an action for rent the court enforced the contract. The judge, in delivering his opinion, said: "Some things lie too deep in the common sense and common honesty of mankind to require either argument or authority to support them; and this, I think, is one of them."

The court, in the case of *Navigation Co. v. Wood*, 17 Barb., 382, said: "When it is a simple question of capacity or authority to contract, arising either on a question of regularity or organization, or of powers conferred

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

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by the charter, the party who has had the benefits of the contract can not be permitted to question its validity in an action upon it."

In *Whitney Arms Co. v. Barlow*, 63 N. Y., 62 [20 Am. Rep., 504], it was said: "The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, where it would not advance justice, but, on the contrary, would accomplish a legal wrong." In *Sherman Center Town Co. v. Morris* [19 Am. St. R., 134; 23 Pac., 569], the charter of a corporation provided, "The indebtedness of the company shall not exceed \$500 at any one time," and the suit was for an amount nearly four times in excess of the charter limit. The company received and used the merchandise, but undertook to plead *ultra vires* against the payment of the excessive note, and also claimed that the president and secretary were unauthorized by the board of directors. The court said: "After a corporation has enjoyed the benefit of a contract or other arrangement made in good faith with any of its regular agents, it is but fair that every reasonable presumption should be made in order to hold the transaction binding upon the company. Under these circumstances the acquiescence of the shareholders may often be presumed. . . . While an executory contract made by a corporation without authority can not be enforced, yet, where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. . . . Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity. . . . We think that the limitation of \$500 in the charter of the corporation can not be regarded of any

more force than a by-law. . . . Therefore the limitation of five hundred dollars is for the direction of the officers and agents of the corporation, and may be considered directory only. It does not annul the contract."

In Thompson on Corporations, sec. 5705, it is said: "There is an implied warranty upon the part of the corporation, through its officers, that the power has not been exhausted, and that the conditions do not exist which render it unlawful for the corporation to contract the debt; so that, to allow the corporation to avoid the repayment of the debt on this ground, where it has had and enjoyed the benefit of the contract, would be to allow it to make its own wrong the means of defrauding the innocent public. It is immaterial on what ground the courts which hold the corporation can not be permitted to repudiate an honest debt upon such a plea place themselves—whether they say that the statute is directory merely or that the corporation is estopped from setting up the defense after having enjoyed the benefit of the contract—especially where the money borrowed has been used in conducting the legitimate corporate business, with the knowledge and consent of all its officers and stockholders. The judges are in all cases driven to the conclusion by the mere stress of justice."

In Jones on Mortgages, sec. 127, it is said: "But even if the directors exceed their authority in borrowing money for the corporation, and executing a mortgage to secure the repayment of it, the corporation can not, after enjoying the benefit of the loan and acquiescing in the transaction, question their authority. The stockholders may restrain the directors or other officers in any attempt to transcend their powers; but if they remain silent, and permit them to make contracts or execute mortgages upon their prop-

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

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erty, and receive the benefits of the loan, they will be estopped to say that the officers were not authorized to do these acts."

In *Allis v. Jones, et al.*, 45 Fed. Rep., 148, the court said: "The money was received by the companies, and used in conducting and carrying on their legitimate corporate business, with the knowledge and consent of all the officers and stockholders. On these facts the banks are entitled to be repaid their money, and the companies could execute a valid security for its payment. . . . Skeen can not be heard to urge this objection, because he is not a creditor of the milling companies; and Allis became such, if at all, after the debts to the banks had been created, and it would seem, therefore, that he is in no plight to raise the question. The written promise of the milling companies, executed by their secretary and treasurer, to pay the plaintiff's debt, under all the circumstances of this case, made it the debt of the companies. But an application to the plaintiff's case of the strict rules which he seeks to have applied to the bank's claim and mortgages would undoubtedly undermine his own case, and leave him without any claim against the companies."

In *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America* [27 C. C. A., 82], 82 Fed. Rep., 133, the court said "Can the mortgagor, under these circumstances, avail itself of its violation of the statute to defeat the mortgage upon which it has borrowed this money? If not, have its subsequent creditors any better standing to assail it? These are the crucial questions in this case. This is a suit in equity. The terminal company has received the full benefit of the proceeds of these bonds, and it obtained this money upon the faith of this mortgage. The creation of the debt and mortgage was not without

the general scope of its powers, but it was the result of the excessive exercise of one of those powers. . . . The statute, whose provisions the bonds and mortgage violate, prescribed no penalty for such a violation. It did not declare that bonds and mortgages issued to secure an indebtedness in excess of the limitation it fixed should be void. Since the Legislature imposed no such penalty, it is not the province of the courts to do so. The remedy for the violation of this statute is not the destruction of the contracts which evidence it, but the ouster and dissolution of the corporation at the suit of the State. The State alone can complain of it, and the debtor can not usurp its functions. . . . A man can not plead his own wrong to relieve himself from the obligations of an executed contract whose benefits he retains; nor is it any defense for a private corporation, against the enforcement of an executed contract whose benefits it holds, that, while its execution was within the general scope of its powers, it involved an excessive exercise of one of them. While it retains the benefits of such contract, it silently affirms, and may not be permitted to deny, its validity. . . . These decisions do not rest upon the principle of estoppel, nor depend upon the creditor's ignorance of the excessive indebtedness. They stand upon the rule that he who seeks equity must do equity, and upon the principle that one may not at the same time accept the benefits and repudiate the burdens of his contracts."

In *Haldeman v. Ainslie*, 82 Ky., 399, the corporation was limited by its articles to incur a liability of \$15,000. It contracted an indebtedness of over \$30,000. This indebtedness was largely to banks, and the court said: "In this case we think it clear that the banks could have recovered

Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.

of the stockholders, for the reason that those conducting the business of the corporation had created this indebtedness for the benefit of the corporation."

In *German National Bank v. Louisville Butchers' Hide & Tallow Co.*, 97 Ky., 34 [29 S. W., 882], the notes were discounted by the corporation at the German National Bank, and upon these notes suits were brought. It was sought to defeat a recovery upon them upon the ground that the act of discounting notes was *ultra vires*. The corporation got the proceeds of the notes, and the court held that a corporation could not hold on to the money and repudiate the act by which it had got it. The court approved what Brice on *Ultra Vires* said (2d Eng. Ed., 769), to-wit.: "In every case a corporation must account for benefits which it has received in an *ultra vires* transaction. This is a well-known equitable doctrine. It has been applied, not only to persons of full age, and under no disability, civil or mental, but also to those who are under some incapacity—infants and lunatics. From these persons the principle has been extended to corporations."

It is suggested the conclusion which I have reached is in conflict with the case of *First Nat. Bank of Covington v. D. Kiefer Milling Co.*, 95 Ky., 104 [23 S. W., 676]. In that case it appeared that the corporation became indebted to the bank in the sum of \$77,000, in violation of its articles of incorporation, which only authorized it to incur an indebtedness not to exceed \$30,000. The corporation was insolvent, and the court below adjudged that the bank should participate ratably in the distribution of the estate on \$30,000 of its debt, and this court concurred in that view. The court in that case did not decide what would have been the effect of the violation of the provision of the articles of incorporation if it had been simply a question between the bank and the corporation.



As the reason for sustaining the judgment of the court below, the court said: "But the enforcement of that provision is demanded by the assignee for the benefit of other creditors, who have been prejudiced by the unauthorized and illegal dealing of the bank with an unfaithful officer of the milling company, whereby its insolvency was precipitated, if not actually caused; and in such case a participant in the fraudulent transaction, not other innocent creditors, should suffer."

It appears from the opinion that the fraudulent conduct to which reference was made in the part of the opinion just quoted was that of George M. Kiefer, in discounting at the bank, and receiving the proceeds of, drafts purporting to have been signed by the corporation. If the bank was a participant in the fraudulent transaction of an officer of the corporation in discounting drafts purporting to have been drawn by the corporation, the court properly adjudged that innocent creditors should not suffer. Indeed, if the alleged indebtedness had been created by the bank participating in a fraudulent transaction with one of the officers of the corporation, it should not have been permitted, to any extent, to participate in the distribution of the estate.

If the Bank-Kiefer case be construed to mean that a creditor, who has not been guilty of participating in a fraudulent transaction by which his debt was created, can not enforce his debt, because the corporation debtor, in making it, exceeded the limit fixed by its articles of incorporation, it is in conflict with *Haldeman v. Ainslie and German Nat. Bank v. Louisville Butchers' Hide & Tallow Co.* If it can be construed as holding that, although the creditor was not guilty of participating in a fraudulent transaction, its debt can not be enforced in the settlement of the

*Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.*

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estate of its insolvent debtor, then it is neither supported by reason or authority, and is in conflict with the legal deduction which logically flows from the Haldeman and German Nat. Bank cases.

The evidence in this case does not tend to show that the bank participated in any fraudulent transaction, or that any officer of the glass company was guilty of any fraudulent conduct, as all the money which was obtained from the bank by the officers of the corporation was used for its benefit. If the bank's debt could have been enforced against the corporation before it became indebted to the other creditors, the mere fact that it so became indebted would not invalidate its claim; neither would the insolvency or subsequent assignment of the glass company's property affect its validity.

If the rule enunciated in this case is to prevail, who should suffer in the settlement of the estates of insolvent corporations which have violated the provisions of the charters? Is it to be the creditor who has the largest debt, contracted before the debts of the other creditors? Why single out such a creditor, and say, because the indebtedness of the insolvent corporation to it is greater than the amount of indebtedness which it is authorized to contract, that such creditor shall participate in the distribution of the trust estate only to the extent of an amount equal to the liability which the corporation was authorized to incur, and then say to all creditors whose debts are contracted after the corporation has exceeded its limit of authorized indebtedness that, "as your several debts are less than the amount of the indebtedness which the corporation is authorized to contract, you may participate in the distribution of its insolvent estate to the full amount of the debts which you hold?" If the court is

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Reynolds v. Commonwealth.

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to lay down a rule that the charter provision limiting the indebtedness is to be enforced, it reasonably follows that the creditor whose debt was contracted within the limit of, and before the corporation exceeded, its authority, should alone participate in the distribution of the estate, because the debts of all other creditors were contracted at a time when the corporation was not authorized to do so, and would be unenforceable. If the large creditor is presumed to be acquainted with the articles of incorporation of its debtor, and to know whether or not it is exceeding its authority in incurring it, the subsequent and small creditor is bound by the same presumption.

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## CASE 3—INDICTMENT FOR SELLING LIQUOR—MARCH 8.

## Reynolds v. Commonwealth.

## APPEAL FROM OWSLEY CIRCUIT COURT.

1. SALE OF SPIRITUOUS LIQUOR.—A petition for an election under section 2554 of the Kentucky Statutes, and an order for an election to be held pursuant to said petition, directing the election to take the sense "of the legal qualified voters in said district as to whether or not spirituous, vinous or malt liquors, or brandies, or a mixture thereof, of the manufacturer's own material, shall be sold, bartered or loaned in quantities *as low as one quart in said district*," are not responsive to either state of case authorized by that section of the statutes; and a prohibition law being in force in Owsley county prior to such election, its force was not impaired by such an election.
2. SAME—INDICTMENT.—The election being void, it was not necessary for the indictment to state in what part of the county the offense took place; the prohibition law in force being applicable to the entire county.
3. SAME.—It was not a valid objection to the indictment that it alleged a sale of less than five gallons in violation of the spec-

## Reynolds v. Commonwealth.

ial statute prohibiting the sale in quantities of less than twenty gallons, for while the local statute prohibited a sale in quantities of less than twenty gallons, the provisions of the general local option law have been substituted for those of the local act as to the amount necessary to be sold to constitute an offense, as well as to the penalty

4. **SAME.**—It was not necessary to allege that the sales were made without license. The local option law being operative in the county no license could be legally granted.

**E. E. HOGG FOR THE APPELLANT.**

1. The indictments in cases Nos. 256, 255, 254, 251, 250, 249, 248, 247, and 246 are bad and the demurrer to each of them ought to have been sustained by the trial court.
2. The instructions of the court were erroneous in each case. The court should have instructed the jury under the general liquor law instead of under the local option statute.
3. After an election to take the sense of the voters in Cow Creek precinct No. 4, has been held and resulted in favor of the sale of liquor and the certificate of the canvassing board had been entered on the order book of the county court the general liquor law prevailed only and no legal conviction could be had under the local option or prohibition law:

Authorities: Ky. Stats., secs. 465, 1304, 3556, chap. 81; Young v. Com., 14 Bush, 165; 83 Ky., 61.

**W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR THE APPELLEE.**

1. As to indictment No. 106, the offense charged was shown to have been committed long before the election mentioned was held in precinct No. 4.
2. The various sales were charged as being made in violation of the local option law of Owsley county. Therefore, it was not necessary to charge that they were made without license. If the local option law were operative no license for the sale of liquor could have been legally granted.

Citations: Gayle v. Owen County Court, 83 Ky., 61; Ky. Stats., secs. 465, 2554; Acts April 4, 1884, Acts 83-4, vol. 1, p. 1116.

**JOHN C. EVERSOLE ON THE SAME SIDE.**

The appellant was indicted under the local prohibition law of 1884 modified in procedure and penalty by the general law

and the special election did not conform to section 2554 of the Kentucky Statutes.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

The appellant was found guilty under ten indictments, each of them charging him with the offense of selling spirituous, vinous and malt liquors "by the drink, pint, quart, gallon, and in other quantities less than five gallons, in violation of the provisions of an act of the General Assembly of the Commonwealth of Kentucky prohibiting the sale of intoxicating, spirituous, vinous and malt liquors, and the mixture thereof, in quantities less than twenty gallons, in the counties of Laurel, Rockcastle, Jackson, Owsley and Clay, approved April 4, 1884, he not being a legal manufacturer, distiller or druggist."

A number of objections are urged on behalf of appellant, but as several of them are disposed of by the decision of the one last urged in the brief, we will first consider that.

Upon trial of the cases the appellant introduced the record of an election attempted to be held in Cow Creek precinct No. 4, in Owsley county, under section 2534 Kentucky Statutes, which provides for holding an election, upon petition of 25 per cent. of the legal voters, "for the purpose of taking the sense of the legal voters of said county, city, town, district or precinct, who are qualified to vote at elections for county officers, upon the proposition whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or whether or not any prohibition law in force in any county, city, town, district or precinct, by virtue of any general or special act or acts, shall become inoperative." The requisite number of voters in the Cow Creek precinct appear to have signed a petition, but not for an election to

take the sense of the voters of that precinct upon either of the propositions upon which the statute authorized it to be taken. The petition asks an election to take the sense "of the legal, qualified voters in said district as to whether or not spirituous, vinous or malt liquors or brandies, or a mixture thereof, of the manufacturer's own material, shall be sold, bartered or loaned *in quantities as low as one quart* in said district. . . . Said petitioners further request that at said election the proposition as to whether the present local option law now in force in said district shall become inoperative or not as to the sale of spirituous, vinous or malt liquors, brandies, or mixtures thereof, of the manufacturer's own make, *in quantities of not less than one quart.*" The order directed the election to be held in Cow Creek precinct "to take the sense of the legal and qualified voters of said precinct as to whether or not spirituous, vinous, malt liquors or brandies, or mixture thereof, may be sold by the manufacturer thereof in quantities of not less than one quart, or whether or not the present local option law shall be operative or inoperative as to the sale, bartering, loaning or dealing in spirituous, vinous or malt liquors or brandies, or mixture thereof, by the manufacturer thereof, in said No. 4 aforesaid, in quantities of not less than one quart." And the certificate of the canvassing board shows "that at an election held in Owsley county, and in Cow Creek precinct No. 4 in said Owsley county, on the 11th day of September, 1897, for the sale of spirituous, vinous or malt liquors in precinct No. 4 in Owsley county, in quantities of not less than one quart, there were eighty-nine votes, and against the sale of spirituous, vinous or malt liquors in precinct No. 4 in Owsley

county, as low as one quart, fifty-seven votes, as shown by the returns of said election officers," etc.

It is evident that the petition did not request an election to be held, nor was the election held, for either of the purposes authorized by the statute. The question submitted by the petition, and upon which the sense of the legal voters of Cow Creek precinct was taken, was the adoption of a special local option law for that precinct of Owsley county not authorized by the statute and as it was special legislation, applicable alone to that precinct, it was in violation of the Constitution, even if the statute had authorized it to be so submitted. Both the propositions which the petition requested to be submitted to the vote, and which were by the order submitted, were tainted with the limitation, "in quantities of not less than one quart;" and, if the election was valid, the law in Cow Creek precinct is different from the law in every other precinct in the State. The election was, therefore, in our judgment, not merely invalid, but void, and so shown on the face of the record.

The limitation as to the quantity to be sold is so intimately connected with the remainder of the proposition submitted that it is impossible to separate them and strike out the unconstitutional limitation, for what the people voted upon was not whether the law should become inoperative, but whether it should become inoperative as to sales of not less than a quart.

The election being void, it was unnecessary that the indictment should specify in what part of the county the offense took place, for the reason that it was unlawful to sell in every part of the county.

Objection is also made on the ground that the indictments allege a sale of less than five gallons, in violation

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

of a special statute prohibiting the sale in quantities less than twenty gallons. This was not error, for, while the local statute forbade the sale in quantities less than twenty gallons, the provisions of the general local option law have been substituted for those of the local act as to the amount necessary to be sold to constitute an offense, as well as to the penalty. *Stamper v. Com.*, 19 Ky. Law Rep., 1014; [42 S. W., 915]; *Thompson v. Com.*, 20 Ky. Law Rep., 397; [45 S. W., 1039], and [46 S. W., 492, 698].

Nor was it necessary to allege that the sales were made without license; for, the local option law being operative in the county, no license could be legally granted. For the reasons stated, the judgment is affirmed in each of the ten cases; the whole Court sitting.

#### CASE 4—ACTION FOR NEGLIGENCE—MARCH 9.

### Louisville & Nashville R. R. Co. v. Creighton, Etc. Same v. Stock's Administrator.

#### APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **NEGLIGENCE QUESTION OF FACT.**—It is a question of fact for the jury whether it is negligence on the part of an engineer running a train along a street of a populous city not to be constantly on the look-out for persons coming on the track; but the failure of the fireman or flagman so to be on the look-out is not negligence.
2. **DAMAGES—EXCESSIVE.**—A verdict for \$17,500 compensatory damages to a woman thirty-five years old, who seems to be in possession of all her faculties and not especially disfigured, and whose capacity for attending to her household duties is to some extent impaired but not destroyed, is excessive; although it appears that the injuries complained of resulted in confin-

106	43
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p130	535
f131	139



Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

ing her to her bed for two months, and although it appears that she walked on crutches for some time and suffered much from hysteria and headache, and injured her head from which a possibility arises of danger of her mind being affected.

3. SAME.—A verdict for \$10,500 damages for the loss of life of an infant between three and four years old is excessive.

**WRIGHT & ANDERSON FOR THE APPELLANT.**

In both cases counsel argued that the damages were excessive, appearing to have been given under the influence of passion and prejudice, and in support of the contention cited: L. & N. R. R. Co. v. Fox, 11 Bush, 495; Same v. Shivell's Admr., 13 Ky. Law Rep., 902; Same v. Foley, 15 Id., 18; Same v. Earle's Admr., 15 Id., 185; Same v. Popp, 16 Id., 369; Same v. Mitchell, 10 Id., 211; Same v. Moore, 7 Id., 646; Same v. Sheets, 11 Id., 781; Same v. McEwan, 17 Id., 406; Same v. Graham's Admr., 17 Id., 1230; Same v. Kingman, 18 Id., 82; Ky. Cent. R. R. Co. v. Smith, 14 Id., 456; Same v. McMurty, 3 Id., 625; Same v. Ryle, 13 Id., 862; Standard Oil Co. v. Tierney, 13 Id., 626; Same v. Same, 16 Id., 327; L. & N. R. R. Co. v. Minogue, 12 Id., 378; N. N. & M. V. R. R. Co. v. Campbell, 15 Id., 715; E. Tenn. Telephone Co. v. Simms' Admr., 18 Id., 762; Louisville Water Co. v. Upton, 18 Id., 326; Cincinnati & S. Cov. St. Ry. Co. v. McCleave (not yet published); C. & O. Ry. Co. v. Lang's Admr., 19 Ky. Law Rep., 65; L. & N. R. R. Co. v. Minogue, 12 Ky. Law Rep., 379; Jordan's Admr. v. Cin. N. O. & T. P. R. R. Co., 11 Ky. Law Rep., 204; Blake v. Midland R. R. Co., 18 Q. B., 93; L. & N. R. R. Co. v. Morris' Admr., 11 Ky. Law Rep., 698; L. & N. R. R. Co. v. Berry's Admr., 16 Ky. Law Rep., 722; Ky. Cent. R. R. Co. v. Gastineau's Admr., 7 Ky. Law Rep., 3; Holleran v. Bagnell, 6 Law Rep. Ireland (C. P. Div.), 333; Duckworth v. Johnson, 4 H. & N., 653; Dalton v. Southeastern Ry. Co., 93 Eng. Com. Law Rep., 296; Franklin v. Same, 3 Hurlestone's & Norman's Rep., 211.

**W. S. PRYOR AND WM. GOEBEL FOR APPELLEES.**

1. The instruction in the Creighton case, that if the life of the child was imperilled by defendant's negligence, then Mrs. Creighton had the right to make an attempt to rescue the child, and if in doing so she was injured, she could recover, provided that in making the attempt she used ordinary care, was prop-

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

- erly given. *Pennsylvania Co. v. Langendorf*, 48 O. St., —, 13 L. R. A., 190; *Eckert v. Long Island R. Co.*, 43 N. Y., 502; *Spooner v. Delaware, L. & W. R. Co.*, 115 N. Y., 22; *Linnehan v. Sampson*, 126 Mass., 506; *Donahue v. R. R. Co.*, 83 Mo., 560; *Shearman & Redfield on Negligence*, sec. 85; *Wharton on Negligence*, sec. 314; *Beach on Contributory Negligence*, sec. 15.
2. The servants of the defendant in charge of the train had no right to assume that the child would not go upon the track in front of the engine. *Shearman & Redfield on Negligence* (5th ed.), sec. 481; *Bishop Non-contract Law*, sec. 1037; *L. & N. R. R. Co. v. Popp*, 96 Ky. 99.
  3. Instruction "B" was not objected to, nor the ruling of the court giving same excepted to by the appellant, and no question as to its correctness can therefore be made or considered in this court. The affidavit of counsel that he objected to the instruction will not control the certificate of the judge that the instruction was not objected to. *Garrard v. Ratcliffe*, 83 Ky., 389; *Patterson v. Com.*, 86 Ky., 324-5; *Civil Code*, sec. 337.
  4. It results from the married woman's property act of 1894 that a right of action on account of any permanent impairment of the capability to work and earn money by a married woman, belongs to her and not to her husband. *Jordan v. Middlesex R. R. Co.*, 138 Mass., 425; *O. & M. Ry. Co. v. Casley*, 107 Ind., 32; *Harmon v. Old Colony R. R. Co. (Mass.)*, 30 L. R. A., 658.
  5. The instruction as to the measure of damages in the Stock case was identical with the instruction upon the same subject in the case of *C. & O. Ry. Co. v. Lang's Admr.*, 19 Ky. Law Rep., 65, which instruction in the Lang case was declared to contain no error.
  6. The damages were not excessive. *L. S. & M. S. R. R. Co. v. Rosenwerg*, 113 Pa. St., 544; *Fair v. L. & W. R. R. Co.*, 21 Law Times, 326; *Choppin v. N. O. &c. R. R. Co.*, 17 La. Ann., 19; *Shaw v. Boston & Worcester R. R. Co.*, 8 Gray, 45; *C. & N. W. R. R. Co. v. Jackson*, 55 Ill., 492; *Caldwell v. N. J. Steamboat Co.*, 56 Barb., 426; *Walker v. Erie & R. Co.*, 63 Barb., 260; *Harrold v. N. Elevated R. Co.*, 24 Hun, 184; *L. & N. R. R. Co. v. Popp*, 96 Ky., 99; *Ky. Cent. R. R. Co. v. Smith*, 93 Ky., 449; *C. N. O. & T. P. R. R. Co. v. Dickerson's Admr.*, 19 Ky. Law Rep., 1817; *Austin Rapid Transit Co. v. Cullen*, 29 S. W., 256; (rehearing denied, 30 S. W., 578); *Chipman v. Union Pac. R. Co.*, 12 Utah, 68.

Lou. & Nash. R. R. Co. v. Creighton. &c. Same v. Stock's Admr.

M. L. HARBESON, FOR THE APPELLEES IN A PETITION FOR A REHEARING,  
OR FOR A MODIFICATION OF THE OPINION, ARGUED:

(1) That the judgments of the court below should be affirmed,  
or,

(2) If not, then the opinion should be modified that the jury  
should be instructed that they might find punitive damages.

Citations: Ky. Cent. Ry. v. Smith, 14 Ky. Law Rep., 458; L. &  
N. R. R. Co. v. Morris' Admr., 14 Ky. Law Rep., 467; C. N. O.  
& T. P. R. R. Co. v. Dickerson, 19 Ky. Law Rep., 1818; Ky. Centl.  
Ry. Co. v. Gastepreau's Admr., 83 Ky., 125; C. N. O. & T. P. Ry.  
Co. v. Herklotz, 20 Ky. Law Rep., 750. L. & N. R. R. Co. v. Popp,  
96 Ky, 99.

WRIGHT & ANDERSON FILED RESPONSE TO THE PETITION FOR A RE-  
HEARING AND MODIFICATION.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

These two appeals involve substantially the same  
facts, and have been heard together.

On April 30, 1895, about 5 o'clock in the after-  
noon, a freight train of appellant was passing  
along Saratoga street, in Newport, Ky., on the  
track of the railroad, about the middle of the  
street, moving at the rate of four or five miles an hour.  
Three little children were playing in the yard of appellee,  
Minnie Creighton, fronting on the street, and she was  
standing at the gate of a neighbor, talking. An organ  
grinder began playing on the opposite side of the street.  
This attracted the attention of the children, and they  
came out of the yard to go over where the organ grinder  
was. When they got out on the sidewalk, appellee, Min-  
nie Creighton, called to them to stop. Her two children  
stopped, but the third child, William Stock, went on across  
the street. Seeing that the little child, who was between  
three and four years of age, was endeavoring to run across  
the street in front of the train, which was then very  
close at hand, she screamed, to stop the engine. There

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

being no answer, she said, "My God! you will kill that child." She watched for the engineer in the cab, and, seeing no one there to rescue the child, rushed out to the track; and as she was attempting to reach him, the child was run over. Before she could get out of the way the engine then struck her, fracturing her skull and hip, and inflicting other painful bruises, which caused her intense pain. The child was killed.

These two actions were filed in September, 1895, by her and the administrator of the child, to recover of appellant damages for the injury to her and the death of the child. The jury returned a verdict in her favor for \$17,500, and in favor of the administrator of the child for \$10,500. Several grounds are relied on for reversal; among others, that the verdicts are excessive.

The evidence warranted the submission of the cases to the jury, but it did not warrant a finding of punitive damages; and the court below properly refused to give a peremptory instruction to the jury to find for the defendant, or to give any instruction authorizing them to find punitive damages.

The proof showed that, as the train came along slowly down the street, a flagman was sitting on the beam of the pilot of the engine; and the evidence for the appellees tended to show that he had his face towards the organ grinder, with his back towards the child. This, if true, would not show any negligence on the part of appellant, as the flagman had not charge of the engine or train, and it was no part of his duty, ordinarily, to keep a lookout for trespassers on the track. This was a duty devolving upon those in charge of the engine. It was in daytime, and on a straight track. The

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

proof for appellees showed that the fireman was not on the lookout as the child came across the street, but was shoveling coal into the furnace. This was a duty that was incumbent upon him, and it was no evidence of negligence that he was so engaged. The proof for appellees also showed that the engineer was not ringing the bell, and, although sitting in his proper position, was not looking ahead, but had turned towards the organ grinder, and was looking in that direction. This, if true, was negligence on his part, however momentary may have been his withdrawal of attention from the track in front of him in passing along the street of this populous city, if thereby human life was lost, or personal injuries inflicted. The proof for appellant tended to show that the engineer was at his post and on the lookout, but that the child left the sidewalk and ran out upon the track from the opposite side of the street, and so could not be seen by the engineer at all before the train struck him, as the boiler was between the child and the engineer. If the child suddenly left the sidewalk and ran out upon the track just in front of the train, and too close to it for him to be seen, and the train stopped before striking him, the appellant was not liable. There does not seem to have been any negligence on the part of any of the trainmen except the engineer. But as the train was going slowly, and there is evidence that the child, after running for some feet along the track, stopped on the track, that Mrs. Creighton had time to run out to him before he was struck, and that the attention of the engineer was then upon the organ grinder, we think the case was properly left to the jury, but that, as the opportunity for seeing the child was at the most so brief, the evidence only warranted a recovery of compensatory damages.

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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The appellee Mrs. Creighton was then about thirty-five years old, the mother of five children, robust, and attending to all her household duties. She was confined to her bed about two months. After that she went on crutches for some time, and has suffered much from hysteria and headache. Her physician testifies that from the injuries she has experienced what is known as the "change of life" some ten years sooner than might be otherwise expected, and that from the injury to the skull there is danger of her mind being affected. She testifies, however, very lucidly in this case. She lost no limb. She seems to be in possession of all her faculties, and not to be especially disfigured. She still attends to her household duties, in some measure; and, while her capacity for this is impaired, it is not destroyed. She was not earning any money, and it does not appear that she has any qualification for business or making money that is especially interfered with. Under such circumstances, we think a verdict for \$17,500 is excessive, and should not be allowed to stand. This court has set aside a number of verdicts as excessive, where the facts were as strong as in this case:

In *Standard Oil Co. v. Tierney*, 96 Ky., 89 [16 Ky. L. R., 327; 27 S. W., 983], a verdict for \$20,000 was set aside as excessive where a vigorous man, thirty years old, and earning good wages, was badly burned and disfigured for life, the use of his left arm lost, and his right hand crippled.

In *Louisville Southern Railroad Co. v. Minogue* [12 Ky. L. R., 378; 14 S. W., 357], a verdict for \$10,000 was set aside, as excessive, where the evidence authorized punitive damages, and the appellee was nearly as badly injured as here.

In *Louisville & Nashville Railroad Co. v. McEwan*, [17

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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Ky. Law R., 406; 31 S. W., 465], a verdict for \$18,000 for injuries received by a young lady while a passenger upon appellant's train was set aside, as excessive, where she had been shot in the face, the ball breaking the bone of the face, closing one nostril, partially paralyzing the face, and disfiguring her for life.

In Louisville Water Co. v. Upton, [18 Ky. L. R., 326; 36 S. W., 520], a verdict for \$6,750 for loss of a hand was set aside as excessive.

A number of other cases might be cited in this and other States. It is hard to measure the just amount of compensation in such cases as this, but the amount allowed by the jury here is so large as to strike the mind at first blush as excessive.

The same is true of the verdict for the death of the child. No recovery can be had for the sorrow or suffering of the parents. The measure of damages is the fair compensation to the estate of the child for the destruction of his capacity to earn money. The child was under four years of age. There are many diseases incidental to childhood, and it was by no means assured that this child would reach manhood. His earning capacity would be nothing, or comparatively little, until he reached puberty, or near that time. In the meantime he would have to be supported, if he survived the dangers incidental to childhood. What his earning capacity would be after all this is largely a matter of conjecture. This court has sustained a number of verdicts for loss of life, where compensation only was allowed, from amounts ranging from \$5,000 to \$10,000, for adults who were vigorous and had actual money-earning capacity; but we do not think that, where compensation only is allowed, a verdict of \$10,500 for the death of a little child like this ought to stand.

Lou. & Nash, R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

The appellee, Mrs. Creighton, did a most heroic deed, that was calculated to win the sympathies of the jury, rendering it very difficult for them to try this case dispassionately. Her health was in a great measure wrecked, and it was very hard for the jury to keep out of their hearts, no doubt, the feeling that the defendant ought to pay high for the gloom that had thus been brought upon two households. But these sad occurrences are necessarily incidental to our mode of life and business. Money can not atone for them. The real injury can never be made good. This the law does not attempt to do. It simply tries to measure the pecuniary loss sustained, and it does not justify a recovery beyond a fair compensation for the injury. The judgment in each of these cases is therefore reversed, with directions to the court below to grant appellant a new trial.

JUDGE GUFFY DISSENTING.

I heard the argument in these cases, but was not present when the opinion was handed down; hence my dissent does not appear upon the record as made at that time. But I deem the question involved of so much importance that I feel it my duty to file this my dissenting opinion.

It will be seen from the opinion that the suit was to recover for the death of William Stock, an infant about four years of age, killed, as is alleged, by the negligence of the appellant, in a large city. The jury, under instructions which the majority opinion does not condemn, found a verdict for Stock's administrator in the sum of \$10,500, which is reversed by the majority opinion. It is said in the majority opinion, in substance, that the verdict is excessive, and the majority opinion further says: "No recovery can be had for sorrow



or suffering of the parents. The measure of damages is a fair compensation to the estate of the child for the destruction of his capacity to earn money. The child was four years of age. There are many diseases incident to childhood, and it is by no means assured that the child would reach manhood. His earning capacity would be nothing, or comparatively little, until he reached puberty, or until near that time. In the meantime he would have to be supported, if he survived the dangers incident to childhood. What his earning capacity would be after all this is largely a matter of conjecture. This court has sustained a number of verdicts for loss of life where compensation only was allowed for amounts ranging from five to ten thousand dollars for adults who were vigorous, and had actual money-earning capacity; but we do not think, where compensation only is allowed, a verdict for \$10,500 for the death of a little child like this ought to stand."

It seems to me that the majority opinion is without any foundation, and is a palpable invasion of the province of the jury. That appellant negligently destroyed the life of the child is established by the verdict of the jury, and not disputed by the majority opinion. It was the province of the jury to estimate, from all the facts and surrounding circumstances, the damage; and, if the jury system is not a total failure, the jury was better qualified to judge of the damages than this court. But I wish particularly to dissent from the statement in the opinion that no damages are recoverable except the amount of money which the infant would earn during its life, after deducting the necessary expenses of living. Such a construction is unwarranted by the Constitution and statute which authorize a recovery in such cases. The majority opinion holds emphatically that the right to

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

live is worth nothing, and that no recovery can be had by any person for the destruction of human life, which to my mind is contrary to the principles of humanity, Christianity and the civilization of the age, and contrary to the plain language and meaning of the Constitution. It has been thought by many that the right to live was the most valuable and the most highly prized of all other rights pertaining to a human being, and yet the majority opinion holds that the only damage that can be recovered is the net sum of money which the decedent would probably have earned, less his expense of living. I do not think that this court had any right to assume that this child would not earn \$10,500 over and above his expenses. If he should have had the good fortune to become the president of a railroad company, at \$25,000 per year, he would in a very few years have earned more than \$100,000. If it should have been his good fortune to become a judge of the Supreme Court of the United States, in a very few years he would have earned many thousand dollars; or, if it had been his good fortune to become a judge of this court, in eight years he would have earned \$40,000, and, allowing \$2,000 per annum for his personal expenses, he would have earned in eight years \$24,000, even if he had not been re-elected; and the jury had just as much right to assume that he would earn a large amount of money as this court had to assume that he would not do so.

It is a well-known fact that many men earn many million dollars during life, and, if one of them should be killed by the negligence or wrongful act of any person or corporation, the recovery, under the doctrine announced in the majority opinion in this case, would amount to millions. If such a man as ex-Senator Brice,

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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or a man like Gould, Vanderbilt, Rockefeller or many others who might be named, had been killed, instead of the child Stock, the judgment must have been for millions of dollars, because the earning capacity could have been established beyond all question; and that, taken in connection with the probable duration of life, would have called for a judgment which would probably bankrupt almost any individual or corporation.

This court in *L. & N. Railroad Co. v. Morris*, [14 Ky. L. R., 456; 20 S. W. 539], refused to require the jury to deduct the living expenses of the decedent from the amount he could earn; and the original opinion in *Chesapeake & O. R. Co. v. Lang's Adm'r*, 100 Ky., 221, [19 Ky. L. R., 65; 38 S. W., 503], adhered to the opinion in the case *supra*. If the doctrine announced in the opinion in this case is the law, then no recovery can be had if the decedent could not have earned more than living expenses, and thus a plain and positive provision of the Constitution would be abrogated or disregarded entirely. It will not do to say that nominal damages, or one cent, could be recovered in all cases, under the opinion in the case at bar; for if the power to earn money does not exceed the cost of living, as announced in the majority opinion in this case, then not even one cent can be recovered, and the result will be that persons and corporations may negligently destroy the lives of a large number of citizens with perfect impunity, and absolutely escape all pecuniary responsibility therefor; and, if the meaning of the Constitution be such as is declared to be the law in this case, life may be destroyed by gross negligence, and still the result must be the same, for it is absurd to say that the estate is damaged any more by the destruc-

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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tion of the life through the gross or willful negligence than by ordinary negligence. The grossness of the negligence has no effect whatever upon the power of decedent to earn money, nor the necessary cost of his living during life.

If it be true that this court, or any other court, has ever announced the doctrine embraced in this opinion in this case, such decisions should be overruled. They are, in my opinion, in direct conflict with the plain provisions of the Constitution, and contrary to humanity and the civilization of the age. It is better to follow the law and justice than to follow precedents. The manifest effect of the opinion in this case is to add to the constitutional provision, *supra*, a provision which would make the section of the Constitution, *supra*, read as follows: "Damages may be recovered in cases where the power of the decedent to earn money is greater than his necessary expenses of living," which, it is plain, would change the language and meaning of the section of the Constitution.

The Constitution says that in every such case damages may be recovered for such death. But the opinion in this case clearly says that no damages can be recovered unless the decedent's power to earn money exceed his necessary expense of living. I insist that the Constitution ought to be the rule of action, and it is the supreme law of the land that no court is authorized to disregard by adding to or taking from.

The opinion in this case is also in direct conflict with section 6 of the Kentucky Statutes. It also seems that the court took into consideration the cost incident to the raising and nurture of the infant, which is, to my mind, palpably erroneous; for it is a legal duty of the

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

parent to rear and take care of his child, and we have the anomalous condition of a parent being denied compensation for loss of the life and society of his child, and yet the cost of his rearing to be deducted from his power to earn money. It seems also, from the majority opinion, that the court was of opinion that this infant was a trespasser upon the track of the appellant railroad. But it has been uniformly held by this court that it was the duty of a railroad, in running its trains through towns and cities, to keep a lookout upon the track. It is clear to my mind that a child about four years old can not be a trespasser. Moreover, it is my opinion that no railroad acquires such an interest in its track as to prohibit persons from crossing it if they desire so to do. In other words, a railroad can not, by building through a man's farm, or through a county, or through the entire State, thus acquire such an exclusive right that every citizen must go to a public crossing in order to cross its track, or otherwise be deemed a trespasser.

As a further dissent, I here copy as follows from my two dissenting opinions in the case of Louisville & N. R. Co. v. Eakin's Adm'r, 103 Ky., 465, [20 Ky. L. R., 743-8; 46 S. W., 496, 47 S. W., 872]:

"I dissent from so much of the opinion in this case as holds that any portion of the earnings of deceased, necessary for his own expense, should be deducted from the amount the jury should be allowed to assess as damages for the destruction of his power to earn money. The portion of the opinion from which I particularly desire to dissent reads as follows:

"In the fifth instruction the court said: 'If the jury find for the plaintiff, the measure of damages will be the capacity of deceased to earn money, coupled with

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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his expectation of life." This instruction is in direct conflict with a number of recent adjudications of this court. Under it, all that was necessary for the jury to do to arrive at a verdict, was to determine how much deceased was capable of earning in a year, and multiply that amount by his expectation of life. This entirely leaves out of view the fact that deceased necessarily applied a certain portion of the money earned by him to his own support. The true measure of damages is not the capacity of deceased to earn money, but is such a sum as will reasonably compensate his estate for the destruction of his power to earn money and in arriving at the amount of this sum the jury are authorized to consider all the testimony in the case bearing upon this question. This question has been so carefully and thoroughly considered by this court in *Louisville & N. R. Co. v. Graham's Adm'r*, [17 Ky. L. R., 329; 34 S. W., 229]; *Louisville & N. R. Co. v. Kelly's Adm'r*, [19 Ky. L. R., 69; 38 S. W., 852]; *Chesapeake & O. R. Co. v. Lang's Adm'r*, [19 Ky. L. R., 65; 38 S. W., 503], that any further elaboration of this idea is unnecessary.

"It seems to me that the rule announced in the opinion, *supra*, is in conflict with section 241 of the Constitution, which reads as follows: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from corporations and persons so causing the same.'

"And also in conflict with the spirit of section 54 of the Constitution, which reads as follows: 'The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property.'

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

"The rule announced in the majority opinion in this case would always prevent the recovery for any damages where the power of the decedent to earn money was not greater than the amount necessary to defray his expenses of living, or, in other words, to furnish him with food, raiment and shelter and pay his taxes, and would certainly defeat recovery in all cases where the decedent was not able, or his capacity was not sufficient, to earn more money than was necessary to furnish him with food, raiment and shelter. Such a rule would, in a large number of cases, defeat any recovery for damages for the killing of a wife, because the capacity of a wife to earn money in excess of what it would cost to furnish her with food, raiment and shelter could not be shown, for the reason that it would not, in fact, exist and the same may be said in regard to the killing of infants, for, after deducting the cost of their necessary nurture and their support after maturity, their power to earn money would rarely exceed the expenses aforesaid. Can it be that the organic law of the land intended that the husband should recover of the party causing the death of his wife only so much as she was able to earn over and above what was necessary to support her? Or can it be said that such a rule should be applied to the destruction of the life of an infant? Under the rule announced in the majority opinion, it is manifest that no recovery could be had for the destruction of the life of an old and infirm person, because it is manifest, and must have been obvious to the framers of the Constitution, that such person could not earn more money than was necessary to support him.

"If the framers of the Constitution had intended that the net earnings of the decedent should be the criterion of recovery, it seems clear to me that they would have

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

so expressed it; but the expression used is 'damages,' and, to my mind, that can only mean such damages as the party to be affected thereby sustained.

"In the case of husband or wife, the damages include, not only the power to earn money, but damages incident to the deprivation of the society of the life partner, as well as the satisfaction of having some one vitally interested in the welfare of the family to look after and care for its interest. I know of no case where the party suing for personal injuries was restricted in the right of recovery to only such net sum of money as they could earn over and above their expenses. Not only so, but such persons have been allowed to recover for mental and physical suffering, as well as the necessary expenses incident to medical treatment.

"Indeed, I am not aware of any case in which the damages for wrongs inflicted are restricted as is proposed in the majority opinion in this case. So far as I am advised, no such doctrine was ever announced by this court prior to the Lang case, nor by any circuit judge of this State.

"For the reasons indicated, and for many other reasons not now deemed necessary to state, I feel it my duty to file this dissenting opinion."

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"Since the filing of my dissenting opinion of June 15, 1898, a petition for rehearing has been considered and overruled by the court. The majority opinion has, however, been modified by striking therefrom the following: 'This entirely leaves out of view the fact that deceased necessarily applied a certain portion of the money earned by him to his own support.' This modification of the opinion, however, leaves the majority opinion open to the



construction that damage to the estate of the decedent is all that can be recovered; in other words, that no recovery can be had beyond the number of dollars that the decedent would earn over and above his necessary expense of living, and entirely leaves out of view any damages resulting to any person for the loss of society or personal care or attention of the deceased. Such a construction is not, as I think, authorized by the language used in the Constitution, nor supported by reason or humanity. There can be no damage to the estate except in dollars, for the only meaning that can be properly attached to 'estate' is money or property. Section 241 attached to 'estate' is money or property."

Section 241 of the Constitution reads as follows: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The General Assembly shall provide how the recovery shall go and to whom belong and until such provision is made, the same shall form a part of the personal estate of the deceased person.'

"It will be seen from the foregoing provision that the Constitution uses the term, 'in every such case damages may be recovered for such death.' But if it be true that only the damage to the estate can be recovered, then it follows that in many cases no damages can be recovered, because the injured party would be incapable of adding anything to his estate, while in many other cases he or she could add nothing in excess of what was necessary for his own or her support and thus the decision of the court

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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would, in effect, destroy a plain provision of the Constitution.

"It will be further seen, from the provision of the Constitution, that it was not intended by the framers of the Constitution that the damages should constitute necessarily any part of the estate of the decedent, because it is provided that the General Assembly may provide how the recovery shall go and to whom belong, with the further provision, until such provision is made, that the damages shall form part of the estate of the deceased person; the latter provision being evidently inserted to prevent confusion until the Legislature acted. It seems clear to me that the rule announced in the majority opinion is in conflict with the plain meaning of the Constitution, and also inequitable, because in many instances the survivor would not be seriously injured, except on account of loss of society of the decedent, but nevertheless would be entitled to have a large judgment.

"For instance, a judge of the Supreme Court of the United States earns at least \$10,000 a year for life; and \$2,000 for personal expenses, I take it, would be a very liberal allowance; and if his expectation of life was fifteen years, the damage to his estate by the destruction of his life could not be less than \$120,000; while another man might not be able to earn more than one dollar per day, and more than one-half of that would be required for his support, and his expectation of life might be the same, while the recovery for his death could not exceed \$2,500, and yet, as a matter of fact, his death would entail more want and suffering upon those depending upon him than those in the former case. Again, many railroad presidents, and presidents of other large establishments, receive \$25,000 per year, and it is liberal to allow \$2,000

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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per year for their personal expenses; and, applying the same rule of damages, the recovery for the death of such a one would be \$345,000.

"It is perfectly clear that the estate would be damaged to that extent, unless we should assume that he would not be able all his life to earn such a salary. Similar results would attend the recovery in case of death of a great number of officers who hold during life. It seems to me that the framers of the Constitution never intended any such results. The parties most interested in the life of another are the wife, husband, parent and child, and evidently the framers of the Constitution intended that they should be entitled to recover such damages as they sustained; and, as before indicated, the loss of society and personal protection is the chief element of damage.

"Can it be that the framers of the Constitution intended that the husband or wife, although incapable of earning a dollar per month, might be killed by the negligence of some person, and the survivor unable to recover any damages? I think not.

"It seems to me that the Legislature which met soon after the adoption of the Constitution understood the constitutional provision as I now understand it. Section 6 of the Kentucky Statutes provided for the enforcement of the constitutional provision, and thereby discharged the duty imposed upon it. Said section reads as follows: 'Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

such damages shall be prosecuted by the personal representative of the deceased. The amount recovered, less funeral expenses and costs of administration, and such costs about the recovery, including attorney fees, as are not included in the recovery from the defendant, shall be for the benefit of and go to the kindred of the deceased in the following order, viz.: First, if the deceased leaves a widow or husband, and no children or their descendants, then the whole to such widow or husband; second, if the deceased leaves either a widow and children or husband and children, then one-half to such widow or husband and the other one-half to the children of the deceased; third, if the deceased leaves a child or children, but no widow or husband, then the whole to such child or children. If the deceased leaves no widow, husband, or child, then such recovery shall pass to the mother and father of the deceased, one moiety each, if both be living; if the mother be dead and the father living the whole thereof shall pass to the father; and if the father be dead and the mother living, the whole thereof shall go to the mother; and if both father and mother be dead, then the whole of the recovery shall become a part of the personal estate of the deceased; and after the payment of his debts the remainder if any, shall pass to his kindred more remote than those named above, as is directed by the general law on descent and distribution.'

"It will be seen from the section *supra* that after the payment of funeral expenses and the cost of administration, and such costs about the recovery, including attorney fees, as are not included in the recovery from the defendant, the amount recovered shall go first to the widow or husband, in the event that the deceased left no children or descendants; but if the deceased leaves a widow and chil-

Lou. & Nash. R. Co. v. Creighton, &c. Same v. Stock's Admr.

dren, or husband and children, then one-half to such widow or husband, and the other to the children of the deceased. Further provision is made, in the event of the deceased leaving neither descendants, widow, nor husband, that the recovery shall pass to the mother and father; and, in the event that the deceased leaves none of the relatives mentioned, it is provided that the recovery shall become a part of the personal estate of the deceased, and, after the payment of his debts, the remainder, if any, shall pass to his kindred, under the general law of descent and distribution.

"Thus, it will be seen that the Legislature utterly failed to recognize or treat the damages as a part of the personal estate of the decedent, in the common acceptance of the term.

"It is further provided in the section *supra* that when the act is willful, or the negligence is gross, punitive damages may be recovered. If the true meaning of the Constitution is that the damage to the estate of the decedent is all that can be recovered, then it must follow that no punitive damages can in any case be recovered; for it is impossible for the willfulness or grossness of the act to increase the damage to the estate. When a party is dead, his capacity to earn money is effectually and entirely destroyed, and the damage to his estate can neither be increased nor decreased by the character of the act causing his death. The mental anguish of the widow, husband, parent and child may be increased because of the grossness or willfulness of the act, and, indeed, such would always be the case; but the character of the act can in no wise affect the estate.

"The court below in the case at bar authorized the jury to find for the plaintiff the damages sustained by the

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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widow and children, not exceeding the amount sued for, which instruction is condemned by the majority opinion. It is suggested that they are not parties to the suit, but we have seen, from the statute heretofore quoted, that they were the chief beneficiaries, or, in other words, entitled to most of the recovery; and, in my opinion, the prime object of the provision in the Constitution was for the benefit of the surviving widow, husband, parent and children. Some quotations from decisions of other States are embodied in the majority opinion in support of the opinion. It does not appear whether or not the decisions referred to were rendered under such provision as we find in our organic and statutory law. I therefore assume that such was not the case, but, if my assumption is wrong, I still have no hesitancy in holding that such opinions are radically wrong.

"I think it was the intention of the framers of the Constitution that all damages that a survivor sustained by the loss of life, as specified in the Constitution, should be recovered, and that it was the intention that the loss of society, care, and protection reasonably given, and expected to be given by the decedent, should be given considered in estimating the damages; and therefore the plaintiff in such cases should be allowed to prove whether the decedent left a companion or children or parents, and that the damage suffered by such bereft relative should be recoverable. Such a rule would be fair, reasonable and humane. Where there are no such relatives as those mentioned in the statute, a money consideration would be the just and proper criterion; for, as a rule, a creditor or distant relative would sustain no damage, except to the extent that the death of the party lessens the amount of money which he would leave for distribution.

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

"It is difficult to understand how the estate of decedent is to be compensated for damages caused by the destruction of decedent's power to earn money. Estate is property. If the decedent owned an estate at the time of his death, the same remains. Estate is not a person capable of suing or being sued, nor can it be affected by sorrow or joy; hence, I conclude that it can not suffer damages nor be compensated. But I can understand how a husband or wife, parent or child, may be damaged by the death of a relative or companion, and I can understand how some compensation might be made; and it seems to me that the Constitution has provided that such injured party may be compensated for not only the power of decedent to earn money, but for the loss of the society of the decedent, which is often more valuable and desirable than the money he could earn. Take the case of a wife and children who have sufficient estate to enable them to supply every want or demand; the death of the head of the family would, so far as money is concerned, be little or no damage, although he was earning \$10,000 per year, but the loss of the society and protecting care of the decedent would be very great damage to the wife and children; and for such damage, it seems to me, they are entitled to recover. On the other hand, I can imagine a case of an old and infirm couple, who have accumulated enough to live upon, but who now unable to earn a dollar. It is possible, if not probable, that the wife may lose her life by the negligence or wrongful act of some one, and yet, as she has no capacity to earn money, no recovery could be had, under the doctrine of the majority opinion, as I understand it; yet it can not be denied that the damage to the bereaved husband would be very great. It appears clear

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

to me that the Constitution says that the husband is entitled to damages for the loss of his companion, and that enjoyment of her company is one of the elements of damages for which a recovery is allowed. The law is not harsh. If the killing be not the result of negligence or wrongful act, no recovery can be had. If it be the result of negligence or wrongful act, the wrongdoer should make reparation in all cases.

If no recovery can be had except for the destruction of the power of decedent to earn money, less the necessary cost of living, then there can be but little recovery in the great majority of cases; and in many cases there can be no recovery at all, while in a few cases the recovery must be immense.

"Section 54 of the Constitution provides that 'the General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death or for injuries to person or property.'

It appears to me that the majority opinion limits the recovery provided for, by excluding one of the elements of damage, viz., loss of company, society, and association, which, to my mind, is usually the chief damage sustained by the party damaged. The importance of the question involved is my only apology for this earnest, but respectful, dissent."

I also dissent from the opinion reversing the judgment in favor of Creighton, for the reason, first, that the proof abundantly sustains the verdict of the jury, and that setting it aside is an invasion of the province of the jury. It has always been the law of this State that the jury was peculiarly fitted to assess damages, and there is nothing in this case to authorize the conclusion that the jury were influenced by passion or prejudice.



Moreover, section 54 of the Constitution provides, "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death, or for injuries to person or property," And unless there is some extraneous circumstance, or evidence that the jury was influenced by passion or prejudice, this court has no legal right to say that the verdict is excessive. And, besides, the testimony in this case, by the physicians, shows that the plaintiff, Creighton, had a fracture of the skull, extending from the occipital protuberance or base of the skull around to the ear (a fracture of about four and one-half inches), in which you could lay your finger between the bones of the skull; that the doctors had to introduce a scalpel, and spring the skull back into place; that the brain was exposed; that there were four other cuts, extending from the eye up over the head, about eight or ten inches in length, and another on the left side, probably four or five inches, along the scalp, and others from two and one-half to four inches, and one other fracture of the skull, and also a fracture of the hip joint; that she was in bed eight weeks, with a constant weight of twelve to fourteen pounds upon the limbs. She was bruised all over her body where the wheel had cut her and thrown her around, and her body was black and blue all over her back and limbs. Her left ear was cut, and she was cut about the face. The injury affected her whole nervous system, making her hysterical—she continues to suffer with her head—and has caused a change of life probably ten years earlier than she ought to have had it, she being now thirty-five or thirty-six years of age. Her injuries have incapacitated her from doing work. She is nervous and excitable, and will be found crying in the middle of the night, hysterical and nervous. And the doctor also

Lou. & Nash. R. R. Co. v. Creighton, &c. Same v. Stock's Admr.

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gave it as his opinion that her injuries are permanent, and will increase, and that she will eventually lose her mind.

It seems to me that the injuries, as described by the physicians, to say nothing of the other evidence, fully warrant and sustain a larger verdict than \$17,500. From the expressions in the opinion, it might be inferred that it is based upon the theory that the destruction of her power to earn money is the criterion of recovery in her case; but I hadly think that such was the intention. If so, it is in direct conflict with all the decisions that have ever been rendered by this court in regard to personal injuries.

It must be remembered that the testimony heretofore referred to was taken in December, 1896, and that the injury complained of occurred in April, 1895; hence it is perfectly clear that the injury to plaintiff is permanent, and that she is prematurely aged, to the extent of ten years, as a result thereof; and besides she is in imminent danger of losing her mind.

It seems to me that the injuries inflicted are such as to not only sustain and justify a verdict for \$17,500, but even to authorize a much larger one. The two facts of the premature age of ten years and the present injury to her mind, with the probability of its total destruction, alone sustain, and in fact called for, a verdict as large as the one rendered by the jury.

I apprehend that no person would be willing to suffer the two injuries named, for double the amount of the verdict in this case. It is true that the money recovered would not restore plaintiff to her former condition, but it would enable her to procure the best medical treatment possible, as well as to enable her to obtain

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Scott v. Tully. &c.

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all other means possible to relieve her deplorable condition, and to surround herself with what conveniences and luxuries it might be possible to obtain, to relieve, and if possible to alleviate, her suffering, as far as human skill and appliances can do so.

For the reasons given, and many others that might be stated, I very earnestly and respectfully dissent from the majority opinion in these cases.

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CASE 5—WRIT OF PROHIBITION—MARCH 9.

## Scott v. Tully, Etc.

## APPEAL FROM M'CRACKEN CIRCUIT COURT.

WRIT OF PROHIBITION.—A writ of prohibition will not lie from the circuit court to a court of a justice of the peace to prevent the latter from giving an erroneous construction to a statute where the amount involved is within the jurisdiction of the justice's court.

## CAMPBELL &amp; CAMPBELL FOR THE APPELLANT.

1. Section 1701 of the Kentucky Statutes is special or class legislation and is in conflict with the general exemption law of the State. *Schoolcraft's Admr. v. L. & N. R. R. Co.*, 13 Ky. Law Rep., 517; *Kentucky Trust Co. of Louisville v. Lewis*, 82 Ky., 579; *Winchester Bldg. & L. Assn. v. Gordon*, 12 Bush, 110; *Smith v. Warden*, 4 Ky. Law Rep., 553.
2. The writ of prohibition was a proper remedy. *Gould v. Capper*, 5 East., 345; *Spelling on Extraordinary Relief*, vol. 2, sec. 1732; *Arnold v. Shield*, 5 Dana, 20; *Pennington v. Woolfolk*, 79 Ky., 13; 3 Ky. Law Rep., 42; Civil Code, sec. 479.

## NO APPEARANCE FOR THE APPELLEES.

## JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

There was pending before J. C. Tully, a justice of the peace of McCracken county, an action wherein the Jake

Beiterman Grocer Company sued James S. Scott to recover on an account for \$21.87, in which action a general order of attachment was obtained and served upon the Illinois Central Railroad Company as garnishee, and by its answer it appeared that there was due him a sum less than \$50. He was a housekeeper, with a family depending upon him for support, and did not have on hand sufficient provisions, including breadstuffs and animal food, to sustain them for one year, and claims that in lieu thereof he was entitled to have adjudged to him the sum in the hands of the garnishee as exempt from the payment of the debt. He appears to be a laborer who works for wages, and the sum due him was wages earned in the service of the garnishee. It is averred that Tully, in other cases involving the same question, decided that an amount due for wages could be subjected to the payment of similar debts, and he would do so in that case.

It is insisted that section 1697, Kentucky Statutes, secures to him the fund in contest as exempt from the payment of the debt due the grocer company; and that section 1701, Kentucky Statutes, which reads as follows: "The wages not to exceed fifty dollars, of all persons who work for wages, shall be exempt from execution, attachment, distress for rent, garnishment or fee-bills: Provided, That the exemption of fifty dollars shall not apply to debts contracted for food, raiment (fuel, medicine) or house rent for the family"—is unconstitutional, because it is partial legislation, etc. It is contended that under section 1697 any person other than one who works for wages would be entitled to personal property, wages, money, or growing crops in lieu of bread-stuffs and animal food to sustain his family for one year; whilst under section 1701 a man who works for wages is not given such rights.

It is useless for us to go into the history and philosophy of exemption laws, or to determine whether section 1701, Kentucky Statutes, is inconsistent with section 1697, Kentucky Statutes, or whether or not section 1701 is violative of the bill of rights or the Federal Constitution, etc. As we understand this case, that question is not involved on this review of the judgment of the court below.

The plaintiff sought to have issued by the circuit court of McCracken county a writ of prohibition against the justice of the peace, to compel him to abstain from the trial of the case. It is only where a court of inferior jurisdiction is proceeding to try or control a case out of its jurisdiction when the circuit court is authorized to issue a writ of prohibition.

Section 479, Civil Code of Practice reads as follows: "The writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction, prohibiting it from proceeding in a matter out of its jurisdiction."

The appellant claims that the court has not jurisdiction, because, under the law, the debt in the hands of the garnishee is not liable to the payment of the plaintiff's debt; and he proceeds to argue that, therefore, the court did not have jurisdiction of the case. This proposition can not be maintained.

In the case of *Arnold v. Shields*, 5 Dana, 19 [30 Am. Dec., 669], the court had under consideration precisely the same question as is involved in this case. In that case it was claimed that the statute imposing the penalty which was sought to be enforced in the justice's court was unconstitutional. The opinion in that case is to the effect that prohibition will lie only to prevent a court from proceeding in or exercising control over a case of which it has no jurisdiction, and does not lie to prevent a tribunal

from deciding erroneously; that an unconstitutional act, being void, could not confer jurisdiction upon a court; and that the justice of the peace could not take cognizance of an action for a penalty imposed by it *if the right to do so depended exclusively upon the statute imposing it.*

The court in this case, as in the Arnold-Shields case, had jurisdiction independent of the statute, the constitutionality of which is questioned; and the mere fact that the justice of the peace would treat as valid an act which was unconstitutional in rendering a judgment would not authorize the court to issue a writ of prohibition. When the jurisdiction of the court is fixed by a valid act, it can not be said that the court is proceeding without its jurisdiction, because, if permitted to try the case, it would render an erroneous judgment.

In delivering the opinion of the court in Arnold v. Shields, Judge Robertson said: "The authority of the circuit court to order the prohibition depends altogether on the assumed fact that the justice of the peace had no jurisdiction over the cases in which he was attempting to proceed; for it is well settled that a writ of prohibition does not lie to prevent a court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate, but can be sustained only for preventing usurpation of judicial power by a court which has no authority to decide the case in which it assumes the right to act judicially."

We are of the opinion that the circuit court properly decided that it had no right to interpose by a writ of prohibition. Having reached this conclusion, we have disposed of the question here for review; and should we express an opinion on the question as to whether section 1701, Kentucky Statutes, is unconstitutional, it would be advisory,

and we therefore deem it best to confine our opinion to the question before us for consideration.

The judgment is affirmed.

CASE 6—IN EQUITY—MARCH 9.

King, Etc. v. Middlesborough Town & Lands  
Co., Etc.

APPEAL FROM BELL CIRCUIT COURT.

1. **DESCENT AND DISTRIBUTION—HALF BLOOD.**—Collaterals of the half blood take by descent one half as much as those of the full blood.
2. **APPEALS—PARTIES.**—It seems a residuary devisee may appeal from a judgment partitioning the lands of his testator without joining the personal representative; but whether so or not, the joinder of the personal representative in the appeal will cure the omission.
3. **SAME—CLERICAL MISPRISION.**—Where the facts from which a title by descent is derived are correctly stated in the pleadings, the pleader's erroneous conclusion as to the legal effect of the facts, carried into judgment is a judicial error and not a clerical misprision.
4. **AGREED JUDGMENT—MISTAKE.**—This court will not hold a party to an agreed judgment where the agreement was entered into under mistake as to the legal effect of admitted facts.
5. **DESCENT AND DISTRIBUTION—PURCHASER OF UNDIVIDED INTEREST.**—A purchaser by executory contract of land inherited by the vendor jointly with others, is under no legal obligation to redeem the land from the ancestor's debt, although he may have sufficient money in his hands going to the vendee to make such redemption; because to do so would involve a redemption of the interest jointly owned.  
(On petition for extension of opinion.)
6. **DESCENT AND DISTRIBUTION.**—Lands of an infant dying in infancy go by descent to the infant's parents equally, and on the death of such parent such lands pass to his, or her, children as if he, or she, acquired same by purchase.

King, &c., v. Middlesborough Town & Lands Co., &c.

**N. B. HAYS FOR THE APPELLANT.**

1. If a judgment be procured and rendered under a mutual and simple mistake of law and fact as to the interest of the parties and a mutual and simple mistake of facts as to the extent of the mutual rights and obligations of the parties to each other will equity afford relief and correct the mistake? Civil Code, sec 734; Underwood v. Brockman, &c., 4 Dana, 317; Kerley v. Hume, 3 Mon., 183; Ray, &c., v. Bank of Kentucky, 3 B. M., 514; Trimble v. Harrison, &c., 1 B. M., 142; Price's Exr. v. Fuqua's Admr., 4 Mon., 68; Warvelle on Vendors, vol. 2, p. 805, sec. 16; Pomeroy's Eq Jur., (2d. ed.), vol. 2, sec. 849, pp. 1176-78; Ky. Stats., secs. 1393, 1395, 1401, 1402; Talbott v. Talbott, 17 B. M., 1; Milner v. Calvert, 1 Met., 472; Morr v. Hanna, 7 J. J. M., 643; Thorp v. Cotton's Exr., 7 B. M., 441; St. Louis Packet Co. v. Gray, 9 Bush, 148; McWilliams v. Henderson's Hrs., 3 Dana, 569; Newman's Pleading, pp. 258-266.
2. Where an heir conveys all his right, title and interest in the land of his ancestor to a vendee by deed of general warranty at an agreed and average price of \$125 per acre; and where the vendee at the time of said contract knew the estate of the ancestor was not settled, and agrees to pay the debts of the heir and his ancestor to the extent of his obligations, but thereafter fails and refused to comply with his contract and to pay the purchase money to the heir or to settle said debt until said heir's interest in said land which is worth from \$50 to \$80 per acre is sold at a great sacrifice to pay said debts, will a court of equity permit the vendee to hold the part of said lands which was worth \$400 to \$500 per acre without accounting to the heir for the contract price of the part sold to pay said debts? English v. Thomasson, 82 Ky., 280; Trumbo v. Lockridge, 4 Bush, 415; Buford v. Guthrie, 14 Bush, 630; Perry on Trusts (4th ed.), vol. 1, p. 305, sec. 232; Gault v. Trumbo, 17 B. M., 685; Berry v. Walker, 9 B. M., 466; Sidner v. Hawes, 37 Ohio St., 533; 24 Am. & Eng. Ency. of Law, 248-253.
3. We do not admit that J. Smith Hays, administrator, and N. B. Hays were necessary parties to the first appeal from the judgment of October 12, 1894; however, we contend appellant will be permitted to amend his statement at any time before the final submission. Hersperger v. Smith, 15 Ky. Law Rep., 605.



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King, &c., v. Middlesborough Town & Lands Co., &c.

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**W. S. PRYOR ON THE SAME SIDE.**

King has such interest in this litigation as will entitle him to appeal; and if so, the case must be reversed in order that his contract may be enforced. *Kesley v. Hume*, 3 Mon., 183; *McWilliams v. Herndon's Admr.*, 3 Dana, 569; *Trimbles v. Harrison*, 1 B. M., 142.

**CALVIN HURST, ATTORNEY AND GUARDIAN *ad litem* FOR J. P. K. TURNER.**

Counsel disclaimed any intention to rely on the judgment in favor of his ward if such judgment gave him a greater interest in the estate of his father and half-sister than he was entitled to, but in view of the fact that the question seemed to be a doubtful one submitted the case with a prayer that the judgment of October 12, 1894, might be affirmed.

**SAMPSON & CHAPMAN IN A BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLEE, MIDDLESBOROUGH TOWN AND LANDS CO.**

1. That a party can not be heard to call in question on appeal a judgment rendered at his instance. *Todd v. McClannahan*, 1 J. J. Mar., 356; *Chambers v. Wilkins*, 2 Litt., 145; *Outten v. Grinstead*, 4 J. J. Mar., 609; *Duncan v. Louisville*, 13 Bush, 383; *Union Bethel Church v. Gaylord*, 1 Ky. Law Rep., 403; *Stem v. West*, 3 Bush, 389; *Stewart v. Durrett*, 3 Mon., 113; *McMurty v. Henry*, 4 Bibb, 411.
2. On question of King not being necessary or proper party to proceeding to divide land. *McIntire v. McIntire*, 82 Ky., 503.
2. On question of rights under covenant of seizin and against encumbrances. *American Assn., Lmt'd., v. Short*, 17 Ky. Law Rep., 626; *Howland Coal & Iron Works v. Brown*, 13 Bush, 687; *Mercantile Trust Co. v. South Park Residence Co.*, 94 Ky., 273.
4. On question of clerical misprision. *Blackwell v. McBride*, 14 Ky. Law Rep., 760; *Bepper v. Thomas*, 85 Ky., 541.

**W. S. PRYOR IN A PETITION FOR A REHEARING AND A PETITION FOR AN EXTENSION AND MODIFICATION OF THE OPINION.**

Additional citations: *Warvelle on Vendors*, vol. 2, ch. 26, sec. 8; *Ream v. Jack, &c.*, 44 Iowa, 325; *Barbour v. Bradley*, 42 N. Y., 316; *Wilson v. King* (N. J.), 8 C. E. Green Eq. p. 150; *Sedgwick on Damages* (8th ed.), vol. 3, secs. 1023, 1024; *English v. Thomasson*, 82 Ky., 280; *Camp v. Moreman*, 84 Ky., 636; *Bourne v. Bourne*, 92 Ky., 201.

King, &c., v. Middlesborough Town & Lands Co., &c.

SAMPSON & CHAPMAN FOR THE APPELLEES IN A PETITION FOR A  
MODIFICATION AND AN EXTENSION OF THE OPINION.

N. B. HAYS FOR THE APPELLANTS IN RESPONSE.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

In 1887, J. C. Turner died, intestate, leaving a wife (who died shortly thereafter) and three children, Alvis, Edith, and J. P. K. Turner. The widow was not the mother of Alvis and Edith, but of J. P. K. Turner. Alvis and Edith were children by a previous marriage, and J. P. K. Turner was their half-brother. Their father died seized of certain tracts of land in Bell county, Kentucky, which descended to his children. Not long after the death of her father, Edith, whilst an infant, died, and her interest in the lands which she inherited from him passed to her brother, Alvis, and half-brother, J. P. K. Turner. The General Statutes were in force at the time of her death, and the sections thereof relating to the descent of infants' estates were exactly the same as those of the Revised Statutes relating to the same subject. The sections regulating it as to a case like this were sections 3 and 9, c. 30, Revised Statutes, and sections 3 and 9, c. 31, General Statutes.

In *Talbot's Heirs v. Talbot's Heirs*, 17 B. Mon., 1, the court was called upon to construe these section and it was adjudged that those of the half blood would take half as much as those of the whole blood. Alvis Turner, of the whole blood, took two-thirds of Edith's one-third of her father's estate; and J. P. K. Turner, being of the half blood, took one-third of her one-third interest. It follows, therefore, that Alvis was entitled to five ninths of his father's estate, and J. P. K. Turner was entitled to four-ninths of it. Alvis entered into a writing with A. A. Arthur, trustee, by which he covenanted to convey to him his interest in the tracts of land of which his

father died seized, and also his interest in the tract which had been conveyed to his father and certain children, including himself. By the terms of this contract, Arthur was to pay him at the rate of \$125 per acre for his interest in the land which was to be thereafter ascertained. Before his interest was ascertained, he executed and delivered to Arthur a deed for his interest in the land, the principal part of the purchase money to be thereafter paid. Before this was done this action had been instituted in the Bell circuit court by the personal representatives of J. C. Turner, to settle his estate and sell whatever might be necessary of his lands to pay his debts. Pending the action, Alvis died testate, and by his will the appellant, J. C. King, was made his residuary legatee. The will was probated, and King, by appropriate pleadings, became a party to the action. Arthur, trustee, became a party to the action, and, by appropriate pleadings, steps were taken looking to a partition of the land between him and J. P. K. Turner, which was accordingly done.

The facts which we have detailed appear in the pleadings, which show the death of J. C. Turner, the children who survived him, and the death of Edith in infancy; but all of the parties to the action seem to have been of the opinion that Alvis took the same share of his sister's estate as did the half brother, and, therefore, that he owned but one-half of the lands which had been left by his father. J. C. King, in his pleading, did not state the interest Alvis had in the lands. The partition of the land was made, and there was assigned to Arthur's vendee, who became a party to the action, the same amount in quantity and quality as was assigned to J. P. K. Turner. The question with which we are confronted is, can King

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King, &c., v. Middlesborough Town & Lands Co., &c.

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prosecute this appeal from the judgment of the court below so ordering a partition of the land and subsequent orders in the case? It appears that the special bequests made by Alvis were all paid, and King was the sole owner of the estate, and he is the party to be affected by the judgment which was rendered.

Under section 734, Civil Code of Practice, an appeal is granted, as a matter of right, to a party or privy against a party or privy, by the court rendering the judgment, or by the clerk of the Court of Appeals, on application of either party or his privy. It is suggested that the personal representatives of Alvis Turner should have prosecuted the appeal. They had no real interest in the remainder of his estate, and the court might have, in this case, ordered the residue of the estate paid to King. If there was any doubt as to the right of King to prosecute the appeal, independent of their wishes, it is removed by the fact that the personal representatives of Alvis Turner came into this court and moved to be made parties to the appeal, and to join with him in prosecuting it. By that proceeding they consented to the prosecution of the appeal.

A more difficult question is presented in view of the condition of the pleadings. The facts which show that Alvis Turner was entitled to five-ninths of the land left by his father were stated in the pleadings; but it is insisted that, in view of the fact that the parties were laboring under the impression as shown by the pleadings, the law only gave him the one-half interest, and he can not now complain on this appeal of the judgment. A motion was made in the court below to have the judgment corrected because it was a clerical misprision; but that was successfully resisted, on the grounds the incorrect-

ness of the judgment was not the result of a clerical misprision. If he can neither get relief by an appeal nor by having the judgment corrected on grounds that the error was a clerical misprision, then he would be with a clear right without any remedy. When the facts are stated in the pleadings, it is for the court to determine their effect in law and pronounce a judgment upon the facts stated in the pleadings. When the facts were stated as we have detailed, it was a mere conclusion of the pleader when it was said that Alvis Turner was only entitled to a half interest in the lands.

In *Kerley v. Hume*, 3 T. B. Mon., 183, it was said: "In replevin, as in other actions, the judgment which it is incumbent upon the court to render is the conclusion of law upon the facts of the case, and not the result of any demand or prayer that either party may think proper to make in the pleadings.

From the pleadings in this case we can not hold that the appellant, King, consented to the judgment which was rendered. The most that can be said is that he did not object to it, because he did not seem to know what his legal rights were. One tract of land which descended from J. C. Turner was known as the "Mingo Mountain Tract," which contained 106 acres, and it was sold to pay his debts after Arthur, trustee, had bought, and Alvis Turner had conveyed to him his interest in it. As there would have been a large sum in the hands of Arthur, due as purchase money on the land when the quantity was ascertained, it is insisted that he should have paid off the debts due from the estate of J. C. Turner, and thus have saved the land from sale; and, as he did not do so, he must account for the difference between what the land brought and its value, according to the contract price.

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King, &c., v. Middlesborough Town & Lands Co., &c.

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If King had paid off the debts of J. C. Turner against the land, he then could have forced Arthur to take and pay for the interest which he bought. There is nothing in the contract which Arthur made with Alvis Turner, so far as this record shows, which required him to pay the debts of J. C. Turner. He could not have paid one-half or five-ninths of them, and thus released the claim of J. C. Turner's creditors on the interest in the tract of land which he bought. To do this he would have been compelled to pay off the entire debts, and in doing which he would have paid the part of the debts for which the interest of J. P. K. Turner was liable. Arthur could not be required to advance money for that purpose and take the chances of being reimbursed from the interest which had descended to the infant. To avoid this difficulty when the land was sold, J. P. K. Turner's guardian and the appellant, King, became the purchasers; and afterwards they came into court and offered their purchase to Arthur on the terms of his contract with Alvis Turner. Arthur could not be compelled to accept the tract of land under his contract with Alvis Turner, because he only bought his interest in it, and was under no obligation to take the interest of J. P. K. Turner. Besides, it appears that King and the infant's guardian never paid for the land; and it is not clear from the record that at that time it was released from the amount of purchase money King, etc., had contracted to pay for it, or that the debts of J. C. Turner had been paid. At that time the creditors may have had the right to enforce their claims against the land by reason of the fact the purchasers did not discharge their obligations. Again, Alvis Turner, being a party to the action, asked for a sale of the land to pay his father's debts, and King seems to have been willing that it should be done.

Armstrong v. Brown, &c. Wright, &c., v. Clark, &c.

We are of the opinion that the land should be re-divided at the cost of King, having regard, as far as possible, to the previous partition, and that Alvis Turner's vendee should be assigned five-ninths instead of one-half of the land which was left by J. C. Turner, and that so much of that interest as has not been paid for should be paid for at the rate of \$125 per acre according to the contract which Arthur entered into with Alvis Turner. The judgment on each appeal is reversed for proceedings consistent with this opinion.

JUDGE PAYNTER IN RESPONSE TO PETITION FOR EXTENSION.

J. L. Turner died in infancy, during the lifetime of his father and mother; and we are of the opinion, from the facts as they appear in this record, that his interest in the tract of land known in this record as the "John Turner, Sr., Tract" descended to his father and mother in equal moieties, and Edith Turner's interest therein descended to Alvis and J. Proctor Knott Turner the same way as did her interest in the balance of the lands.

CASE 7—REPLEVIN—MARCH 10.

Armstrong v. Brown, Etc.  
Wright, Etc. v. Clark, Etc.

APPEAL FROM MARION CIRCUIT COURT.

1. MUNICIPAL CORPORATIONS—CITIES OF FOURTH CLASS—STOCK ORDINANCE.—An ordinance making it unlawful to allow live stock to run at large in a city of the fourth class and providing for a sale of such stock on actual or constructive notice to the owner, is within the police power conferred by section 3490, subsection 31, of the Kentucky Statutes, providing that such municipalities shall have power to "make proper regulations for the im-

Armstrong v. Brown, &c. Wright, &c., v. Clark, &c.

pounding, keeping stock, fixing fees for same and release of same and regulate and prohibit the running at large, &c."

2. SAME—"DUE PROCESS OF LAW."—A notice posted at the court-house door for five days to the unknown owners of impounded stock, followed by five days' advertisement of the sale of same, describing the stock, is "due process of law," and a sale pursuant to such notice and advertisement is valid.

S. A. RUSSELL FOR THE APPELLANT.

The statute does not confer the right to sell or offer impounded animals, nor does the statute make any provision for the redemption by owners of animals impounded and sold. The ordinance was therefore invalid. Dillon on Municipal Corporations (4th ed.), vol. 1, p. 222, sec. 150.

H. W. RIVES FOR THE APPELLEE THE CITY OF LEBANON.

1. No question is raised as to the proceedings having been regular in all respects, if the ordinance itself be a valid exercise of power by a municipality. This power is conferred by section 3490, sub-section 31, Kentucky Statutes.
2. Ordinances for the impounding of stock and sale of same are police regulations, and it is sufficient that the procedure be *in rem*, provided some public notice be given that the owner may have opportunity to demand a judicial investigation on the question of liability of his stock before it is subject to sale. McKee v. McKee, 8 B. M., 433; Varden v. Mount, 78 Ky., 86; Gallagher v. Wooster, 4 Ky., Law Rep., 256; Denham v. Anderson, 14 Id., 391; Gentry v. Little, 16 Ky. Law Rep., 26.
3. A notice of five days' is sufficient to enable every owner of stock taken up in a city to find it if he used reasonable diligence in the search.
4. If, however, the ordinance be invalid, the city of Lebanon is not liable. Taylor v. Owensboro, 98 Ky., 271; 56 Am. St. Rep., 361; Monographic note to Goddard v. inhabitants of Harpswell, 30 Am. St. Rep., 376.

JOHN MCHORD FOR THE APPELLEES NELSON, GLAZEBROOK & CLARK.

1. The stock ordinance of the city of Lebanon is within the power conferred by sub-section 31 of section 3490 Kentucky Statutes.
2. The notice provided for by the ordinance is "due process of law." Gentry v. Little, 16 Ky. Law Rep., 26.



## JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

These two cases involve the same question, and are identical save parties, and will be determined together. The appellants brought these actions in replevin for the delivery of certain live stock, horse and mule, against appellees, the board of council of the city of Lebanon, the chief of police and the purchaser of the stock. The answer pleads, by way of defense, that the property sued for was, under an ordinance duly and regularly passed by the city of Lebanon, taken charge of by the chief of police and impounded, and after notice, as provided by the ordinance, had been given, the said property was, by the judgment of the city court, declared to be forfeited and ordered sold; that after due notice of the time and place of sale, as required by the ordinance, the property was sold at public outcry to the highest bidder and that one of appellees became the purchaser of the property, and that this was the wrongful seizure and possession complained of. The ordinances were set out in full and a certified copy filed with the answer. To this answer a demurrer was overruled in each case, and, appellants declining to plead further, the petition was dismissed absolutely. From that judgment these appeals are prosecuted.

The sole question presented by these appeals is the validity of the ordinance of the city of Lebanon, approved April 12, 1894, entitled, "An ordinance to prevent the running at large of live stock in the city of Lebanon, to provide for a pound, a poundmaster and for other purposes." This ordinance provides in sections one to four that it shall be unlawful for certain kinds of stock, including the kinds here sued for, to roam or be at large within the corporate limits; and that it shall be the duty

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Armstrong v. Brown, &c. Wright, &c., v. Clark, &c.

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of a policeman to seize any such stock found on the street; and permitting any citizen upon whose premises the stock may go, to seize the stock, in either case to be delivered to the poundkeeper; and making it the duty of the person taking up such property to report in writing such fact within twenty-four hours to the police judge of the city of Lebanon, together with a description of the stock and the name of the owner, if known, and, if the owner be unknown, shall so state. This report shall be sworn to.

Section five provides for summons issued against the owner, returnable not less than three days from the issual, to show cause why the stock shall not be sold, etc.

Section six provides: "When the name of the owner of any stock taken up is not known, no summons shall be issued, but it shall be the duty of the police judge to post at the court house door in the city of Lebanon, and at the city pound, a written or printed notice, describing the stock taken up, and when and by whom, and the amount of damages claimed, if any, and requiring the owner to appear before the Lebanon police court, at a time specified in the notice, not less than five days from the posting of the notice, to show cause, if any he can, why the stock shall not be sold as provided by this ordinance."

Section eight provides: "If the owner of any stock taken up under the provisions of this ordinance, after being notified as provided in section five or section six, shall fail to appear and defend, or if his defense be adjudged insufficient, the court shall enter judgment directing the chief of police to sell the stock for the payment of fees, costs and damages assessed against it, and the sale shall be made and reported to the next term of the court

thereafter. Every sale made under this ordinance shall be between the hours of 10 o'clock a. m. and 2 o'clock p. m., in front of the court house door in the city of Lebanon, on a credit of thirty days, with approved security, and after notice of the time, place and terms of this sale shall have been posted at the court house door and at the city pound for five days prior thereto."

The remaining sections provide that the excess of the proceeds of sale over the fees, etc., shall be retained in the city treasury for the benefit of the owner, and paid upon his demand or order, and for the election of a pound-master, and the fees and costs incident to the impounding, trial and sale, and redemption before sale.

The answer specifically alleges a compliance with each provision of the ordinance, the owner of the property being unknown, and not appearing either at the time fixed in the notice for trial or with an offer of redemption. Each step taken is set out in the answer, from the taking up to the sale and payment of the purchase price.

Lebanon is a city of the fourth class, and its charter is found in Kentucky Statutes, sections 3481-3606, both inclusive. Subsection 31 of section 3490 ("Powers of the General Council") provides: "The board of council shall have the right to establish and maintain a pound and make proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large of stock on the streets of the city."

It is clear that the ordinance passed was in pursuance of the authority, or supposed authority, of this charter provision.

It is insisted, however, for appellants, that, under this provision of the charter, the council had no power to au-

thorize a sale or forfeiture of the property impounded, but that it could only fix a penalty against the owner, if in fault, and to fix certain fees and charges as a lien on the property, and to retain the property till the lien be satisfied. It is contended that the language "and proper regulations for the impounding, keeping stock, fixing fees for same and release of same, and regulate and prohibit the running at large," etc., is exclusive of all other power, and that, as the power of sale is not mentioned, it is not given. We are of opinion, on the authority of the cases of *McKee v. McKee*, 8 B. Mon., 433, and *Varden v. Mount*, 78 Ky., 86, [39 Am. Rep., 208], that the city council of Lebanon had full authority to pass the ordinance in question, in so far as it authorizes a sale of the property impounded after a judicial determination by some court that the ordinance has been violated in permitting the stock to be at large. The charter provisions in those cases were not as strong or as clear as in these, yet they were upheld in so far as it provided for a forfeiture and sale.

It is insisted that if the charter authorizes a forfeiture and sale after judicial determination of a violation, still the sale and proceedings herein are void, because the notice required, and the only one alleged to have been given—a posted written notice, describing the property, at the court house door and at the city pound for five days before the day of trial—is unreasonable, being too short, and as it is not alleged that appellants, the owners, had actual notice of the trial or proceedings; that, therefore, there was no notice, and appellants are bound by the trial and judgment of the police court on such notice; and that to thus deprive these appellants of their property is a violation of the constitutional guaranty of the rights of

property, and that they shall not be deprived thereof without due process of law; that it is merely a confiscation, under pretense of the forms of law, of which appellants had neither actual nor reasonable constructive notice. The validity of ordinances of this character has repeatedly been before the courts, and the reports of the various States contain many adjudged cases bearing on this question.

Some courts have held that the power to pass ordinances providing for summary process and sale was legal, and not unconstitutional, as they were within the exercise of the police power, and were of the character of laws that permits the destruction of a building to prevent the spread of fire, or the summary killing of domestic animals to prevent the spread of disease. The other courts hold that the better rule is that, before a forfeiture and sale, there must be some judicial proceeding. With the latter class our courts seem to have agreed, and we think properly so. It is clear that the impounding must be summary, but that there should be some judicial determination of a violation of the ordinance we entertain no doubt.

The serious question arises is five days sufficient time for constructive notice, with another five days before sale in which the owner may redeem? The proceeding to forfeit and order a sale is *in rem*, and can only affect the property impounded. Without a regular service of process and trial, the owner could not be fined, or adjudged to be indebted, exceeding the value of the animal impounded. This being true, the fees and costs of keeping the stock must be paid out of the proceeds of sale, and to require longer notice before trial would add more costs for the keeping of the animal, to be paid by the owner, or retained from the proceeds of the sale. If the unknown

owner was treated as a non-resident, and a warning order made for sixty or ninety days, the costs of keeping would often equal, if not exceed, the value of the property. So, from the very nature of the case, it is necessary, in the interest of the owner and the city, that the property should be sold as early as may be done; giving a reasonable opportunity to the owner to be heard, or, as commonly said, "to have his day in court."

We are of opinion that public posted notice for five days, as required by the ordinance, was reasonable and sufficient to sustain jurisdiction of the police court to declare a forfeiture and render judgment of sale. The reasonable presumption is that personal property, when sold at public outcry, after notice publicly given as provided, will bring its fair market value. After the legal charges and fees are deducted, the owner, by applying to the city treasurer, is entitled to the balance of the proceeds of the sale.

The proceedings had in these cases appear to have been regular, and the ordinance was strictly followed. In our opinion, the answers presented a complete defense, and the demurrers thereto were properly overruled.

Judgment affirmed in each case.

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CASE 8—ACTION ON CONTRACT—MARCH 11.

**Kentucky Citizens Building & Loan Association  
v. Lawrence, Etc.**

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

1. **CONTRACTS—EVIDENCE TO EXPLAIN LATENT AMBIGUITY.**—In an action on a contract whereby one building and loan association assumed the contracts entered into by another such association, by a stockholder of the corporation, making the assignment against

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Kentucky Citizens Bldg. & Loan Assn. v. Lawrence, &c.

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the corporation assuming the liability, it is competent for the defendant to allege and prove facts tending to explain a latent ambiguity in the contract between the two associations.

2. **SAME—MISTAKE IN REDUCING CONTRACT TO WRITING.**—Where the true intention of the parties to a contract is not expressed by a writing, to which the contract is reduced, it is competent for the parties to allege and prove that the real contract between the parties by the mistake of the draughtsman had not been reduced to writing, and it is immaterial whether this mistake was due to a mistake as to the effect of the words used or a mistake in another respect.
3. **CORPORATIONS—POWER TO GUARANTEE DIVIDENDS.**—In the absence of an express statute a corporation organized under chapter 56 of the General Statutes of this State has no power to bind itself by contract with its stockholders to guarantee them dividends not in fact earned. It seems that there is no such statute in this State.
4. **SAME.**—A corporation having no power to guarantee to its stockholders dividends not in fact earned, an assignment by it to another corporation and the guarantee by the latter to carry out the contracts of the former does not carry with it any obligation to pay dividends not earned and the liability of the guaranteeing corporation is merely for a distribution of assets.

**PHELPS & THUM FOR THE APPELLANT.**

1. The appellant company did not assume the guarantees of the Kentucky Building & Loan Association, but merely took its assets and agreed to manage them and mature the stock.
2. There is no substantial difference between the companies as to the contract and if the written evidence of the contract does not express the true agreement, evidence is competent to show the actual agreement.
3. It is competent to allege and prove facts tending to elucidate a latent ambiguity in the contract. *Wilson v. Robertson*, 7 J. J. Mar., 78; *Peich v. Dickinson*, 1 Mason, 11; *L. & O. R. R. Co. v. Ormsley*, 7 Ind., 276; *Breeding's Heirs v. Taylor's Heirs*, 13 B. M., 487; *Gagna v. Withan*, 106 Ind., 545.

**SIMRALL, BODLEY & DOOLAN FOR THE APPELLEES.**

1. The appellant company assumed the liability of the Kentucky Building & Loan Association to its stockholders according to

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Kentucky Citizens Bldg. & Loan Assn. v. Lawrence, &c.

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- the contract between that company and its stockholders. There is no ambiguity in the contract between the two companies.
2. In the absence of a latent ambiguity parol evidence is incompetent to explain a written contract. *Coger v. McGee*, 2 Bibb., 321; *Lemaster v. Burckhart*, 2 Bibb., 29; *Morris v. Morris*, 2 Bibb., 311; *Martin v. Lewis*, 1 A. K. Mar., 76; *Spurrier v. Parker*, 16 B. M., 284.
  3. A mistake of the parties as to the legal effect of language used by them in reducing a contract to writing is no ground of defense or affirmative relief. *Pom. Eq. Jur.*, sec. 843; *Gagna v. Withan* 106 Ind., 545; 1 *Am. & Eng. Ency. of Law*, 532.
  4. There was no usury in the contract sued on.

**SIMRALL & DOOLAN FOR THE APPELLEES IN A PETITION FOR A RE-HEARING.**

1. The question whether the Kentucky Building & Loan Association had power to make the contract assumed by the appellant can not arise in this case because judgment was rendered against that company upon the contract and no appeal was taken from the judgment. The appellant is *quo ad hoc* privy to the judgment against the Kentucky Building & Loan Association and bound thereby. Besides, the appellant has never pleaded that the contract was *ultra vires* and in fact no such suggestion was ever made until the opinion was handed down in this case.
2. There could be no reformation of the contract between the parties and the Kentucky Building & Loan Association without making the stockholders of the latter company parties as they were the direct beneficiaries of the contract by which the appellant undertook to pay the liability of the Kentucky Building & Loan Association to its withdrawing stockholders.

**JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

These three cases involve the same facts and will be disposed of together. Appellees took paid-up stock in the Kentucky Building & Loan Association under its by-laws, which allowed withdrawing members, who held paid-up stock, not less than 8 per cent. per annum, if their money was withdrawn before two years from the date of subscription; not less than 10 per cent. per annum, if it was withdrawn after two years, and before four years, from



date of subscription; and not less than 12 per cent. per annum, if withdrawn after four years, and before maturity.

The association was unable to meet its obligations, and becoming involved, made a contract with appellant by which it turned over all its assets to appellant. After this was done, appellees brought these actions against appellant, alleging that, by the contract between it and the Kentucky Building & Loan Association, appellant assumed all the liabilities of that association to its members. This appellant denied, alleging in substance, that it agreed to take the assets of that association and administer them as far as they would go, assuming no liability beyond the assets received. The court sustained a demurrer to this answer having previously overruled appellant's demurrer to the petition.

The contract between the two associations was in writing. After the court adopted the construction of the written contract put upon it by appellees, appellant filed an amended answer, alleging that the writing was so drawn by mistake of the draftsman, and sought a reformation of it to conform it to the real contract between the parties. To this amended answer the court also sustained a demurrer. Appellant paid appellees the amount due them from the assets received by it, and, declining to plead further, judgment was given against it for the balance claimed by them.

By the written contract, appellant agreed to "assume the liabilities of the Kentucky Building & Loan Association, as shown by their books, and proceed to mature the stock, and attend to the investment for the benefit of the stockholders of the said associations." Appellant averred and proved that before this contract was made it had the account books of the other association examined, that these

books showed just how the association stood with each member, and that this liability so shown on these books, and based on the assets of the company, was the liability it assumed, and that these were the books referred to in the contract; the matter having been fully discussed, and the written contract agreed to, as aptly expressing the agreement of the parties. It is insisted for appellees that ambiguity in a contract can not be helped by averment.

The rule on this subject is thus quaintly stated in the older books: "*Ambiguitas patens* is never holpen by averment. But, if it be *ambiguitas latens*, then otherwise it is." The ambiguity here is latent, and parol proof is clearly competent to show what books the written contract referred to. If the parties used the word "books" to designate certain books of account, this may be shown by parol; for otherwise the intention of the parties might be defeated entirely. This does not vary the written contract, but only shows what objects the parties meant to designate by the terms used. 2 Whart. on Evidence, sec. 937; Wilson v. Robertson, 7 J. J. Marsh., 78; Thorington v. Smith, 8 Wall., 9.

The appellant should also have been allowed to allege and prove that the real contract between the parties had not, by mistake of the draftsman, been reduced to writing so as to express correctly their meaning; and it is immaterial whether this mistake was due to a misapprehension as to the effect of the words used, or a mistake in any other respect.

In Bishop on Contracts, sec. 707, the law is thus stated: "Where parties, having entered into an oral agreement, undertake simply to reduce it to writing, if, by some mistake of the draftsman, or their own misapprehension as to the effect of the words employed, or otherwise, it is found after

execution not to contain or mean what both meant, . . . a court of equity will . . . reform it to express the real agreement."

For these reasons the court erred in sustaining the demurrer to appellant's answer and amended answer. Both the associations referred to are alleged to be Kentucky corporations, and, as we understand the record, were organized under chapter 56 of the General Statutes. Our attention has not been called to any statute authorizing the Kentucky Building & Loan Association to make the contract alleged by appellee, and, in the absence of statutory authority, it had no power to bind itself, by contract with the stockholders to guaranty them dividends not in fact earned. It seems that there was no such statute. However this may be, appellant, without statutory authority, could not assume the debts or obligations of another corporation.

This question was fully considered by this court in the case of Rhorer, Receiver v. Middlesborough Town and Lands Co. 19 Ky. L. R., 1788; 44 S. W., 448]. Under the principles settled in that case, the contract alleged by appellees was not binding on appellant, beyond the amount of the assets received. If appellant had such authority, it must be pleaded; and the petition, without this averment, was fatally defective.

The judgment of the court below is therefore reversed, and the cause remanded, with directions to overrule the demurrer to the answer and the amended answer, and sustain the demurrer to the petition, for the reasons indicated.

## CASE 9—LIQUIDATION OF INSOLVENT BUILDING &amp; LOAN ASSOCIATION—MARCH 11.

Reddick, Etc. v. The United States Building &  
Loan Association's Assignee.  
Stofer, Etc. v. Same.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. **BUILDING AND LOAN ASSOCIATIONS—LIQUIDATION—RIGHTS OF WITHDRAWING MEMBERS.**—In the liquidation of the affairs of an insolvent building and loan association, members who have given notice of withdrawing more than thirty days before the assignment are not entitled to priority in the distribution of assets. By-laws declaring the rights of withdrawing members and section 860 of the Kentucky Statutes are limited in their application to going concerns.
2. **SAME—JURISDICTION TO FORECLOSE MORTGAGE.**—In an action to liquidate the affairs of an insolvent building and loan association, the court has no jurisdiction to foreclose a mortgage on land situated in another county.
3. **SAME—SETTLEMENT WITH BORROWING MEMBERS.**—In settling with borrowing members of an insolvent building and loan association, the borrower is to be charged with the amount of his loan and legal interest and credited by his payments of premium and interest on a partial payment basis, and where the value of his stock is shown by him with reasonable certainty, he should be credited with that also.

CLARENCE DALLAM FOR THE APPELLANTS, REDDICK, ETC.

1. On the jurisdiction of the Jefferson Circuit Court to render a judgment against the appellant when service of summons was had in McCracken county; and, further, the jurisdiction of said court to order a sale of real estate located entirely in McCracken county to satisfy a mortgage lien thereon; 4 Dana, 294; 4 Mon., 437; Civil Code, secs. 62, 21, 428, sub-sec. 2, 438; Phillips on Code Pleading, secs. 181, 468; 1 Bush, 107; 4 Ky. Law Rep., 348; 87 Ky. 107; 14 Ky. Law Rep., 444; 2 Bush, 128; 14 Bush, 788; 78 Ky.,

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

496; 94 Ky., 271; 2 B. Mon., 203; 80 Ky., 647; 11 Bush, 177; 93 Ky., 92; 13 B. Mon., 403; 2 Bush, 552; 79 Ky., 271; 1 Met., 242.

2. On the duty and power of the chancellor in allowing credit for the amount paid in by the borrowing members as dues; whether to allow full credit therefor, or to allow as a credit, the approximate distributable value of the stock. 18 Ky. Law Rep., 768; 19 Ky. Law Rep., 1176; 6 Ohio Dec., 254; 29 Law Rep., 127; 40 Md., 127; 48 Md., 448; 58 Md., 279; 64 Md., 338; 8 Appeal Cases, 235; 11 Appeal Cases, 489; 48 Ga., 44; 30 L. R. A., 693; Endlich on Bldg. & L. Assns. (1st. ed.), sec. 496; 8 S. C., 207; 107 Mass., 1; 136 U. S., 223; 136 U. S., 89; Bispham Eq., sec. 580; Endlich on Bldg. & Loan Assn. (2d. ed.), sec. 531.

WILLIAM W. WATTS FOR THE APPELLANTS, STOPER, &c. (W. W. & J. R. WATTS, M. A., D. A., & J. G. SACHS, OF COUNSEL.)

1. A subscriber for shares in a corporation must at his peril inform himself of the provision of its charter or articles. Oil City Land & Improvement Co. v. Porter, 99 Ky., 524; Thompson's Com. on Corps., sec. 941; Cook on Stock and Stockholders, sec. 54; Endlich on Bldg. Assns. (2d. ed.), sec. 269.
2. A by-law enters into the compact between the corporation which adopts it and every taker of a share; it is in the nature of a contract. Kent v. Quicksilver Mining Co., 78 N. Y., 159; Ho-yoke B. & L. Assn. v. Lewis, 27 Pac. Rep., 872; Bergman v. Assn., 27 Minn., 275; McKenna v. Diamond State Loan Assn., 18 Atl. Rep., 905; Pioneer Savings & Loan Co. v. Brockett, 58 Ill. App., 204; Wm. Englehardt v. Fifth Ward Permanent Dime Savings & L. Assn., 148 N. Y., 281; Thompson on Bldg. Assns., 31; Thompson's Com. on Corps., sec. 940; Endlich on Bldg. Assns. (2d. ed.), sec. 269.
3. Where it is stipulated by the certificate of stock that the by-law of the association shall be part of the contract between the association and the stockholder, the latter will be bound by the by-laws and will not be permitted to question the legitimate exercise of the powers conferred thereby upon the association. Pioneer Savs. & L. Assn. v. Brockett, 58 Ill. App., 204; Wm. Englehardt v. Fifth Ward Permanent Dime Savings & L. Assn., 148 N. Y., 281.
4. Upon the purchase of stock in a corporation, and issue of a certificate therefor, the purchaser acquires vested rights which

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

can not be taken from him except by his acquiescence or consent. Kent v. Quicksilver Mining Co., 78 N. Y., 159; Holyoke Bldg. & L. Assn. v. Lewis, 27 Pac. Rep., 872; Bergman v. Assn., 29 Minn., 275; McKenna v. Diamond State L. Assn., 18 Atl. Rep., 905; Niblack's Benefit Societies (2d ed.), 113; Thompson on Bldg. Assns., 31; Thompson's Com. on Corps., sec. 946; Cook on Stock and Stockholders, sec. 700a; Endlich on Bldg. Assns. (2d ed.), sec. 269.

5. It is the duty of stockholders to be prompt in their application for relief against the acts of the corporation before innocent third persons suffer; otherwise, assent, acquiescence, or ratification will be presumed and the doctrine of estoppel will apply. Kent v. Quicksilver Mining Co., 78 N. Y., 159; Oil City Land & Imp. Co., v. Porter, 99 Ky., 254; Maxville, &c., Turnpike v. Barnes, 14 Ky. L. R., 431; Pocantico Water Co., v. Low., 46 N. Y. S., 633.
6. Persons buying stock in a corporation will, as between themselves and the corporation and other stockholders be deemed innocent third persons. Kent v. Quicksilver Mining Co., 78 N. Y., 159.
7. An unconscionable arrangement will not be disturbed when there has been a ratification of it with the knowledge of all its bearings after time has been had for consideration. Acts of a corporation, not illegal in themselves or by prohibition, but which are *ultra vires* of the corporation, may be made good by the assent of the stockholders so far, at least, that third persons dealing in good faith with the corporation will be protected in a reliance on those acts. Kent v. Quicksilver Mining Co., 78 N. Y., 159; Pocantico Water Co. v. Low, 46 N. Y. S., 633; Maxville, &c., Turnpike v. Barnes, 14 Ky. Law Rep., 431.
8. After a corporation has enjoyed the benefit of a contract made in good faith, every reasonable presumption should be made to hold the transaction binding. A fundamental principle of the law is that one must do equity before he can ask that equity be done him. The benefits can not be retained under the contract when the contract is to be rescinded. And before he can ask that the equitable powers of a court be exercised for him, he must show that he has at least acted honestly with reference to or in connection with the transaction of which he complains. Maxville, &c., Turnpike v. Barnes, 14 Ky. Law Rep., 431; Kent

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

v. Quicksilver Mining Co., 78 N. Y., 159; Pocantico Water Co. v. Low, 46 N. Y. S., 633.

9. The insolvency of a building and loan association is not the point at which the right of a shareholder to withdraw ceases. The association can not be insolvent. Powers v. Bluegrass, &c., Assn., U. S. C. C. Ky. District; *in re* Ambition Society, 1st. L. R. Ch., 1896, 89; Ky. Stats., secs. 564, 855, 860; *in re* National, &c., Assn., 9 W. N. C., 79.
10. When a corporation ceases to be a going concern the assets are to be distributed as though preferred shares had been issued, unless a preference as to capital has been expressly contracted for or has been given by statute. Cook on Stock and Stockholders, sec. 278 and notes; Hohenshell v. Home Savings & Loan Assn., 41 S. W. R., 948.
11. The by-laws of a building and loan association when construed in connection with Kentucky Statutes, secs. 564, 855, 860, gives to the purchaser of stock a vested right to withdraw in compliance therewith, and on compliance the stockholder is no longer such, nor liable for future payments nor interested in future profits. Charter and by-laws of U. S. Bldg. & Loan Assn.; Ky. Stats., secs. 564, 855, 860; Holyoke Bldg. & L. Assn. v. Lewis, 27 Pac. Rep., 872; Bergman v. Assn., 29 Minn., 275; McKenna v. Diamond State Loan Assn., 18 Atl. Rep., 905; Louisville German, &c., Assn. v. Wissing, 4 Ky. Law Rep., 443; McNab v. Southern Mutual Bldg. & L. Assn., 27 S. E. R., 543; Heinighausen & Wolff v. Fischer, 50 Md., 533; U. S. Bldg. & L. Assn. v. Silverman, 85 Pa., 394; Decatur Bldg. & Investment Co. v. Neal, 97 Atl., 717; Hohenshell v. Home Savings & L. Assn., 41 S. W. R., 948; Blackburn v. District Benefit Bldg. Assn., 24 L. R. Ch. Div., 421; *In re* Mutual Society, 24 Law Rep. Ch. Div., 425; Mary Walton v. Henry Edge, &c., 10 L. R. App. Cases, 33; Barnard v. Tomson, 1 L. R. Ch. (1894), 374; *In re* Ambition Society, 1 L. R. Ch. (1894), 89; Scheffel v. South Yorkshire Society, 22 Q. B. Div., 470; Murray v. Scott, 9 App. Cases, 519; Mayer v. Attorney General, 9 Ins. Law Journal, 671; Lepore v. Twin Cities Natl. Bldg. & L. Assn., 40 W. N. C., 548; Kent v. Quicksilver Mining Co., 78 N. Y., 159; Oil City Land & Improvement Co. v. Porter, 99 Ky., 254; Maxville, &c., Turnpike Co. v. Barnes, 14 Ky. Law Rep., 431; Pocantico Water Works Co. v. Low, 46 N. Y. S., 633; *In re* Natl. Savings. & L. Assn., 9 W. N. C., 79; Powers v. Blue Grass, &c., Assn., U.

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

S. C. C. Ky. District; Niblack's Benefit Society (2d ed.), 113; Thompson on Bld. Assns., 31; Thompson's Com. on Corps., sec. 946; Cook on Stock and Stockholders, secs. 54, 278, 700a; Endlich on Bldg. Assns. (2d ed.), sec. 269; Criswell's Appeal, 100 Pa., 488; Idem, 102 Pa., 184; Chapman v. Young, 65 Ill. App. Court Rep., 131; Gibson v. Safety, &c., Assn., 48 N. E. R., 580; Rabbitt v. Wilcoxon, 72 N. W. R., 306; Wm. Englehardt v. Fifth Ward, &c., Assn., 148 N. Y., 281; Pioneer Savings & L. Assn. v. Brockett, 58 Ill. App., 204; Texas Homestead B. & L. Assn. v. Kerr, 13 S. W. R., 1020; Heinbokel v. Natl. S. L. & B. Assn., 59 N. W. R., 1050; Granite State Provident Assn. v. Lloyd, 145 Ill., 620; Strohen v. Franklin S. F. & L. A., 115 Pa., 273; Towle v. American B. & L. Assn., 75 Fed. Rep., 938; Sills v. Natl. S. & B. L. Assn., Chicago Daily Law Bulletin, Jan. 16, 1896; Knoblauch v. Robt. Blum B. & L. Assn., 25 Pitts. Legal Journal, Old Series, 25; Paffert v. Same, same publication.

In a supplemental brief same counsel cited Southern Bldg. & L. Assn. of Knoxville, Tenn., v. Price, from the Court of Appeals of Maryland April term, 1898.

**CARUTH, CHATTERSON & BLITZ FOR APPELLEE (KOHN, BAIRD & SPINDLE, AND SAMUEL A. LEDERMAN, OF COUNSEL.)**

1. The circuit courts of the State of Kentucky have original jurisdiction of all matters in law and equity, except such matters as have been exclusively delegated to one of said courts, or to some other tribunal. Genl. Stats., 1883, p. 281. sec. 1; present constitutional provision, p. 120, sec. 126; Ky. Stats., sec. 966.
2. Actions to settle insolvent estates shall be brought in the circuit court of the county where the assignment is made. Ky. Stats., sec. 96.
3. Actions to settle the estates of deceased persons must be brought in the county in which the personal representative qualified. Civil Code, sec. 65.
4. All persons having an interest in the property left by decedent, and the creditors so far as known, must be parties to the action. Civil Code, sec. 428, sub-sec. 2; sec. 25.
5. This applies also to assignments. Civil Code, sec. 438 and chap. 3, title 10.
6. Actions which must be brought in a particular county. Civil Code, sec. 62.
7. This section (62) held not to apply to actions for the settlement



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Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

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- of an insolvent estate. *Mechanics' Trust Co. v. Cobb*, 14 Ky. Law Rep., 444; *Webb v. Wright*, 2 Bush, 126.
8. Jurisdiction of the circuit court in actions to settle insolvent estates, and the right to sell property located in other counties determined. *Mechanics' Trust Co. v. Cobb*, 14 Ky. Law Rep., 444; *Webb v. Wright*, 2 Bush, 126; *Fishback v. Green*, 87 Ky., 107; *Hendrix v. Nesbitt*, 16 Ky. Law Rep., 746.
9. Who are necessary parties. Civil Code, secs. 25, 428; *Citizens' Bank v. Boswell*, 93 Ky., 92.
10. General equity doctrine. *John H. White v. Boyd Ewing Receiver*, 159 U. S., 36 (Co-operative series); *Peck v. Elliott*, 79 Fed. Rep., 10; *Caufman v. Sayre*, 2 B. M., 203.
11. Borrowing member is not entitled to a credit upon his loan of dues paid in on stock. *Rogers v. Rains*, 18 Ky. Law Rep., 768; *Sachs v. Duckworth B. & L. Assn.*, 4 Ohio N. P., 214; *Choisser v. Young*, 69 Ill. App., 252; *Curtis v. Granite State Provident Assn.*, 36 Atl. Rep., 1023; *Knutson v. North Western L. & Bldg. Assn.*, 69 N. W., 889.

## SAME COUNSEL ON APPEAL OF STOFER, &amp;c.

1. The United States Building and Loan Association is governed by secs 854 to 878, Kentucky Statutes. Ky. Con., sec. 190; Ky. Stats., sec. 573; Resolution of Association, March 3, 1896; Bank Tax Cases, 19 Ky. Law Rep., —; *Sherman v. Smith*, 2 Black (U. S.), 587; *Miller v. New York*, 15 Wall. (U. S.), 478.
2. Both the by-law and the statute provide that withdrawing members shall share losses according to the amount paid on their shares. Ky. Stats., secs. 860, 861, 869.
3. If any conflict exists between a by-law and the statute, the latter prevails. *Trowbridge v. Building Co.*, 52 Pac., 328.
4. Where a right is granted on condition, a declaration on the right must allege the existence of the condition. *Englehard v. Bldg. Co.*, 148 N. Y., 281; *Heinbokel v. Bldg. Co.*, 58 Minn., 340; *Bldg. Co. v. Kerr*, 13 S. W. R., 1020; *Christian's Appeal*, 102 Pa. St., 184.
5. The insolvency of a building and loan company operates to withdraw all the stock the same as a notice and to mature all contracts. *Custis v. Granite State Bldg. Co.*, 31 Atl., 1023; *Kenton v. Bldg. Co.*, 29 N. W., 889; *Stroken v. Bldg. Co.*, 8 Atl., 843; *Eversmann v. Bldg. Co.*, 41 N. E. R., 139; *Post v. Building Co.*, 37 S. W. R., 216; *Christian's Appeal*, 100 Pa. St., 184; *Crisman's*

Reddick, &c., v. The United States Building & Loan Assn.'s Assignees.

Appeal, 100 Pa. St., 488; Rogers v. Raines, 18 Ky. Law Rep., 768.

6. The English cases are much misunderstood in their application. They simply construe and apply the by-laws as a contract between the members. Blackburn v. Bldg. Co., 24 L. R., Ch. Div., 421.
7. Rule 3, under which the English cases allowed a priority to withdrawing members, expressly granted a priority and is in no way similar to the by-law or statute now in question.
8. The American doctrine is, that by-laws of a building and loan company are made with reference to a going, solvent concern and do not apply to a case of insolvency; that the fundamental principle and legal policy for the government of these associations is equality among the members, and any attempt to give a preference to any member or class is void. Hohenshell v. Bldg. Co., 41 S. W. R., 948; Endlich on Bldg. Co. (3d ed.), secs. 514, 498, 499; Christian's Appeal, 102 Pa. St., 184; Criswell's Appeal, 100 Pa. St., 488; Rabbitt v. Wilcoxon, 72 N. W. R., 306; Latimer v. Bldg. Co., 81 Fed., 776; Gibson v. Bldg. Co., 48 N. E. R., 580; Chapman v. Young, 65 Ill. App., 131; Towle v. Bldg. Co., 75 Fed. Rep., 928; Arling v. Bldg. Co., 8 Ky. Law Rep., 699; Friel v. Bldg. Co., 1 L. Rec. Rep., 217; Brown v. Sowders, 9 Mackey, 455; Knoblauch v. Bldg. Co., 25 Pitts. L. J., 39; Palfert v. Bldg. Co., Id., 40; Harvey v. Bldg. Co., 16 W. N. C., 450; Haverty v. Bldg. Co., Id., 451; Rogers v. Rains, 18 Ky. Law Rep., 768.

#### ISAAC T. WOODSON FOR THE INSTALLMENT STOCKHOLDERS.

1. Generally the preferred stockholder is but a shareholder with a right to have his dividend paid before dividends on the common stock are paid, and he is not entitled to any dividend until the corporation has funds which are properly applicable to the payment of dividends. A contract that dividends shall be paid on the preferred stock, whether any profits are made or not, would be contrary to public policy and void. Cook on Stock and Stockholders, vol. 1, par. 271; Endlich on Bldg. Assns., 464; Guinness v. Land Corporation, L. R., 22; Ch. D. 349.
2. By-laws must be reasonable, not contrary to the law, nor the charter, nor opposed to public policy. By-laws which are manifestly contrary to the interest of the association, and all nuga-

- tory and vexatious, unequal, oppressive by-laws are void. Angell & Ames on Corporations, 347; Am. & Eng. Ency. of Law, 1021.
3. Only the powers necessary for the convenient prosecution of the authorized business of the association connected with the legislative intent may be applied; and no other powers exist except such as are expressly conferred upon the association by statute. *Ashland, &c., Co. v. Centralia*, 9 Luz. Leg. Reg. Pa., 41; *Arline v. Kenton Bldg. Assn.*, 26 Am. L. Reg. N. S., 273; Am. & Eng. Ency. of Law, 1017.
  4. All provisions of articles of incorporation of a building and loan association in Kentucky are subject to the statutory provisions of the State, and when repugnant thereto must fail, for the reason that the statute law is the whole law of the case. *Broadus' Devisees v. Broadus' heirs*, 10 Bush, 300; *Bergman v. Association*, 29 Minn., 275; *Endlich on Bldg. Assns.* (2d ed.), secs. 218, 104-106; *Steinharter v. Wolfstein*, 13 Ky. Law Rep., 871; *Latimer v. Bldg. Co.*, 81 Fed. Rep., 776; *Covington v. McMichael*, 18 B. M., 286.
  5. Paid-up stock in an insolvent association can not be treated as preferred stock unless the statute authorizing it has been complied with. *Endlich on Bldg. Assns.*, 104; 262-265.
  6. Neither paid-up stock nor installment stock can be converted into preferred stock in an insolvent association by giving notice of withdrawal. *Endlich on Bldg. Assns.*, 104; *Towle v. Bldg. Co.*, 75 Fed. Rep., 938; *In re Sutherland, &c.*, 24 Queen's Bench Division, 394 (decided in 1890).
  7. The mutual character of the association prescribed that the burden (of losses) must be sustained by the stockholders according to the amount of their stock, for he who participates in the benefit of a business must assist in bearing the burden. *Eversman v. Schmitt*, 53 O. St. Rep., 174; *Knoblauch v. Robert Blumm Bldg., &c., Assn.*, 25 Pittsburg L. J., 39; *Paffert v. Same, Idem*, 40; *Simpson v. Lou. Bldg. Assn.*
  8. A building association is insolvent when it is unable to satisfy the legal demands of its own members. *Endlich on Bldg. Assns.*, 51.
  9. In Kentucky under the statutory regulations, the insolvency of a building association terminates the right of withdrawal and preference in every case, unless to the extent such rights are established by statute and have been secured to the stockholder by pursuing the statutory methods. *Criswell's Appeal*,

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

100 Pa. St., 488; *Post v. Mechanics' Bldg., &c., Assn.*, 97 Tenn., 408; *Brown v. Sowders*, 9 Macky, 455; *Endlich on Bldg. Assns.*, 102-108; *Christian's Appeal*, 102 Pa. St., 184; *In re Sutherland, &c., Bldg. Society*, 24 Q. B. D., 349 (1890); *Rogers v. Raines and Simpson v. Lou. Bldg., L. & Savings Assn.*, ———.

**JAMES E. GAITHER FOR THE STOCKHOLDERS NOT WITHDRAWING**

Notice of withdrawal from an insolvent loan association does not entitle members to priority of payment over their fellow stockholders. *Endlich on Bldg. & L. Assns.*, p. 91; *Chapman v. Young*, 65 Ill. App., 131; *Christian's Appeal*, 102 Pa. St., 184; *Hohenshell v. Home Savings & L. Assn.*, 41 S. W. R., 948; *Endlich on Bldg. Assns.*, sec. 514; *Criswell's App.*, 100 Pa., 488; *In re assigned estate of Natl. Savings L. & Bldg. Assn.*, 75 Fed. Rep., 938; *Sills v. Natl. S. & Bldg. L. Assn.*, *Chicago Daily Law Bulletin*, Jany. 16, 1896.

**BENNETT H. YOUNG AND W. H. GILTNER FOR THE BORROWING STOCKHOLDERS.**

1. Upon the insolvency of a building and loan association, the borrowing members should be entitled to a credit upon their indebtedness to the company of the approximate value of their stock. *Rogers v. Rains*, 18 Ky. Law Rep., 768; 4 Am. & Eng. Ency. of Law, 1081; *Buist v. Bryan*, 21 S. E. R. (S. C.), 537; *Assn. v. Bollinger*, 12 Rich. Eq. (S. C.) 124; *Straus v. Carolina Interstate Assn.*, 23 S. E. R. (N. C.), 450; *Cook v. Kent*, 55 Mass., 254; *Windsor, &c., v. Bandell*, 40 Md., 178; *Low Street Bldg. Assn. v. Zucker*, 48 Md., —; *Bldg. Assn. v. Buck*, 64 Md., 338; s. c. 14 Am. & Eng. Corp. Cases, p. 649; *Brownlie v. Russell*, L. R. 8 Appeal Cases, 235; *Bispham Equity*, sec. 580.
2. The stockholders who had given notice of their intention of withdrawing prior to the date of the assignment, are not entitled to preference over any other class of stockholders. *Thompson on Bldg. Assns.*, sec. 2, p. 60; sec. 10, p. 124; *Hohenshell v. Bldg. Co.*, 41 S. W. R., 948; *Weirman v. International Bldg. Assn.*, 67 Ill. App., 551; *Loan Assn. v. Hollon*, 63 Ill. App., 66; *Eversmon v. Schmitt*, 53 O. St., 184; *Towle v. Amer. Bldg. & L. Assn.*, 75 Fed. Rep., 940.

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

WILLIAM FURLONG AND JOHN ROBERTS FOR APPELLEES, THE  
COMMON STOCKHOLDERS.

1. There can be no withdrawing stockholders of a corporation as of right under the 56th chapter of the General Statutes of Kentucky, because the advertisement required of the amount of capital stock authorized; and the times when and conditions upon which it is to be paid in, would be futile if the capital stock could be withdrawn after paid in. See sec. 5, ch. 56.
2. There could have been no such thing as preferred stock in a corporation organized under the 56th chapter of the General Statutes. See act of April 15, 1882, Genl. Stats., p., 773.
3. When a corporation becomes insolvent or otherwise incapable of existence, then its assets must be distributed among creditors and stockholders according to the principles of equity. *Rogers v. Rains*, 18 Ky. Law Rep., 768.
4. No corporation organized under the 56th chapter of the Genl. Stats. can avail itself of the provisions of the act of April 5, 1893, without first amending its articles of incorporation, or re-incorporating under that act. Ky. Stats., sec. 554.

JUDGE HAZELBRIGG DELIVERED THE OPINION OF THE COURT.

Becoming insolvent, the United States Building & Loan Association, incorporated in 1890 in Jefferson county under the general law then in force, on February 24, 1897, made an assignment of all its assets for the benefit of its creditors, to the Columbia Finance & Trust Company of Louisville.

This suit by the assignee to settle the trust immediately followed, the association and a number of stockholders and creditors being made defendants. It is averred in the petition that in March, 1896, the association accepted the provisions of the new constitution and the laws of the State, and thereby became entitled to the benefit of the provision of the general corporation act of 1893 and we shall assume that, therefore, the association is to have the benefit of the general building and loan association act, as found in the Kentucky Statutes.

The first question to notice on this appeal is that presented by those stockholders who had given what are known as their "withdrawal notices" more than thirty days prior to the assignment, and who, therefore, claim a preference over other stockholders in the distribution of assets.

The by-laws relied on are as follows:

"Sec. 55. Any installment stock not delinquent, nor pledged upon a loan, may be withdrawn by the owner thereof at any time after six months from date of certificate, or thirty days' written notice to the association; and, upon receipt of such notice, all liability to make further payments, and all right to share in the profits thereafter declared shall cease. On such withdrawal a shareholder shall receive, upon the surrender of his certificate of shares, the total amount paid in by him in monthly payments on his shares, together with two-thirds of all credited dividends, less all fines that may have accrued. . . .

"Sec. 59. If the undivided profits on hand at any time are insufficient to pay any loss that may occur, the balance shall be charged up to the shares in good standing, *pro rata*, in proportion to the value thereof, and, if any of the shares be withdrawn, the amount so charged shall be deducted from the amount due on such shares."

It may not be that these by-laws were, in fact, authorized by the statutes in force when they were adopted. Originally (1873) section 7 of chapter 56 of the General Statutes contained a clause authorizing withdrawals of stock; but this clause was repealed in 1878, and it is doubtful if the amendment of 1882 relied on was intended to, or did re-enact this clause.

However, we do not regard these by-laws on the sub-

ject of withdrawals as differing from the provisions of the statutory enactment of 1893 on the same subject, and shall, therefore, treat them as in force, especially as counsel for these stockholders rest their claim of preference alike on the by-laws and the statutes.

The statutory regulation on the subject is as follows:

"Sec. 860. A member may withdraw his unpledged shares at any time by giving thirty days' notice of his desire to do so, in a book to be provided by the corporation for the purpose, and shall thereupon receive the withdrawing value of his shares at the date of the notice; this withdrawing value shall be the amount of the dues paid thereon, together with such proportion of the profit as the by-laws may determine, less all fines, expenses and proportionate part of every unadjusted loss; but at no time shall more than one-half of the funds in the treasury be applicable without the consent of the directors, to the demand of the withdrawing members. . . ." Kentucky Statutes, section 860.

Confining ourselves to a consideration of these provisions as embodying the contract between the parties, and giving them whatever force their language reasonably implies, we are of opinion that the by-laws do not, either when regarded independently of the statutory enactment, or when taken in connection with that enactment, authorize the withdrawing stockholder to the priority contended for. And certainly the statutory provision does not so authorize.

Under whatever circumstances the withdrawal is attempted to be made, the value of the withdrawer's share must be ascertained with reference to the unadjusted losses, if any, of the association.

It is true that under section 55 of the by-laws that val-

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

ue is fixed at the total amount paid in by the member "in monthly payments on his shares, together with two-thirds of all credited dividends," less only all "fines" that may have accrued. But this is only a part of the contract. Under section 59, when losses accrue, they are to be paid out of the undivided profits, and, if these profits are insufficient, then the balance of the loss is to be charged up to the shares in good standing, including any shares that are to be withdrawn.

When we look to the statutory provisions, the language is equally plain. The withdrawing value of the share "shall be the amount of the dues paid thereon, together with such proportion of the profits as the by-laws may determine, less all fines, expenses and proportionate part of any unadjusted loss."

Where the concern is a "going one," and the payment of the withdrawal demands is not met promptly because of a temporary lack of funds, the value of the withdrawing share is ordinarily shown by the book value of the share at the time of the notice of withdrawal, or at least it is easily ascertainable.

But when the concern can not meet these demands because it is insolvent, and the scheme is impossible of performance, then the expenses and the proportionate part of any unadjusted loss are impossible of immediate ascertainment or adjustment, and must so remain until the final settlement of the concern. Upon this settlement the value of the withdrawing share can not differ from the value of every other share in the association. But, looking beyond the mere language of the by-laws and the statutes, it is manifest that these withdrawal contracts are provided for with respect to going concerns only.



The right of withdrawal is not an absolute one, any more than is the right of the borrowing member to pay his loan by monthly payments until the maturity of his stock cancels his loan. Ordinarily the language of the borrower's contract does not attempt to fix the date of this maturity. He simply agrees to pay until the accumulations of the enterprise shall mature his stock. Sometimes, however, there is a fixed and guaranteed period of maturity. But in the latter event no more than in the former can he rely on the exact terms of his contract, and these terms all come to nothing when the scheme falls through.

The chancellor can not carry on the enterprise when the parties themselves have failed, and the only thing possible is to wind it up on equitable principles.

As in the one case the borrowing member can not complain of the violation of his contract coming from a precipitation of the maturity of his loan, so in the other the withdrawing member can not say that he has an absolute right to a specific performance of the letter of his contract.

Judge Endlich, in his work on building associations (2d ed., section 108), affirms the doctrine that "the fact of insolvency of an association negatives the right of any one to obtain a priority over his fellows by giving notice of withdrawal;" citing Christian's appeal, 102 Pa. St., 184, and other cases.

In the well-considered case of *Hohenshell v. Saving Association*, 140 Mo., 566, [41 S. W., 948], (published also with annotations in 4 Am. & Eng. Dec. Eq., 9), this view is forcibly presented, a statute similar to ours being under consideration. The Missouri court is fortified by numerous cases referred to in the annotations indicated. There are

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

cases to the contrary, the latest one of which is *S. B. & L. Association v. Price* (Md., 1898), [41 Atl., 53]. But we believe the rule that we have adopted, and the one which was likewise adopted by the chancellor, is more in accord with the authorities generally, and it certainly more fully meets the demands of common justice in the distribution of the insolvent estate.

The second question presented arises out of the special demurrer of Reddick to the jurisdiction of the Jefferson circuit court. Reddick was a borrowing member, and a resident of McCracken county, when he and his wife executed a mortgage on lands in that county to the association, to secure it in the sum of \$800. He appeared in answer to process on an amended petition, and questioned the jurisdiction of the court to sell his lands situated in a different county. His demurrer was overruled.

Section 62 of the Civil Code of Practice provides that "actions must be brought in the county in which the subject of the action, or some part thereof, is situated, . . . (3) for the sale of real property under a mortgage, lien or other encumbrance or charge except for debts of a decedent." Except for the peculiar relation the borrowing member in these associations sustains to the corporation and his fellow members, we suppose no difficulty could have arisen in the mind of the chancellor as to the application of the section of the Code quoted to the case in hand.

However, whatever may be said of this relation, we have here a plain suit by the corporation against its debtor to sell the mortgaged property to satisfy a debt due the corporation, and it comes within the very letter of the statute, making it a local action. It is also in accord with the common law, which made actions *in rem*

local, and fixed their jurisdiction where the property sought to be subjected was situated. If the corporation was the owner of the property, a different rule would apply; the court having jurisdiction of the settlement of the assigned estate would necessarily have jurisdiction to sell the property assigned. But the mortgage was a mere security for the debt, and passed no title to the corporation.

In *Mechanics' Trust Co. v. Cobb* 14 Ky. L. R., 444, [20 S. W., 391], relied on by appellees, the mortgaged property belonged to the insolvent corporation, as we understand the facts stated in the opinion; and, although it was not situated in Jefferson county, the circuit court was held to have jurisdiction to sell it to protect creditors, stockholders or partners.

So, in *Fishback v. Green*, 87 Ky., 107, [7 S. W., 881]—another case relied on by appellees—the action was one to settle an insolvent estate; and it was held that the court where the action was pending might sell land belonging to the insolvent, although it was situated in another county.

The case of *Webb v. Wright*, 2 Bush, 126, is also relied on by appellees. But that was a suit by Wright against his former partner for indemnity against a firm debt, and it appeared that certain real property in a different county was in lien for the partnership debts. In the suit between the partners, the property under lien was within reach of the chancellor, and its sale was necessary to effectuate his decree of settlement between them. These facts not appearing in the case on its first appeal (1 Bush, 107), the jurisdiction was properly denied. It is apparent that Reddick was not a necessary party to the suit, although he, as well as all stockholders, might have been

*Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.*

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proper parties. Whether in person before the court or not, they were bound by its decrees, because they were represented by the corporate body. *Calloway v. Glenn, Trustee*, 20 Ky. L. R., 1447, [49 S. W., 440].

The suit, we are to notice, is not against the stockholders for unpaid subscriptions, as there can be no enforceable liability of that kind in these associations. We must look at the transaction between the borrowing member and the corporation as simply a loan of money, and must therefore regard the suit to enforce the lien as a local action, and as coming within the provisions of the Code already quoted.

The third question, also presented by *Reddick*, involves the amount of credit to which he is entitled in the suit on the mortgage. He borrowed the sum of \$1,700 on April 4, 1893; and, for the purpose solely of qualifying him to borrow, he became a stockholder in the association, and subscribed for twenty shares of the stock. He has paid monthly some \$29 from the time he borrowed the money until the date of the assignment; in all about \$1,330. Of this sum, \$780 were for interest and premium, and about \$550 were payments on his stock. At the date of the assignment, however, the stock stood on the book of the association as of the value of \$620; the difference, it is said, being the dividends credited on his stock.

On the plan of settlement adopted in the *Simpson* case, 19 Ky. L. R., 1171, [41 S. W., 570 and 42 S. W., 834], and contended for here by *Reddick*, the sum due on the mortgage would be the result after charging him with the sum borrowed, with legal interest, and crediting him with all payments; including, therefore, payments made as interest and premiums as well as those made as dues on his stock; the calculation being made on the principle of

partial payments. This plan would result in rejecting the association's proffered credit of dividends, and, properly so, because the member has repudiated the contract under which the profits were distributed to his stock. But while, in the Simpson case, there was no suggestion of expense in administering the affairs of the concern, the fact that every share was chargeable with its proportionate part of the ordinary expenses of conducting the affairs of the company was recognized, if not distinctly asserted. When the borrower was credited in these going concerns with only his actual payments of interest, premiums and dues, he was not being permitted to escape altogether payment of his share of the running expenses. He was allowed only six per cent. per annum interest on his payments, whereas his money had probably earned, by the system of compounding the interest, a larger per centum. But when, from any cause, the association ceases to be a "going concern," and especially if it becomes an insolvent one, a different plan of settlement is necessitated.

That plan is foreshadowed in *Rogers v. Rains*, 100 Ky., 295, [38 S. W., 483], where it was held that the receiver of a Tennessee association then in process of settlement in the courts of that State might collect the sum borrowed, with six per cent. interest, less all payments made as interest and premiums, but that, as it was impossible for the Kentucky court to determine the value of the stock, no credit could be given for payments made thereon.

The true principle is that the stock of each stockholder is burdened with its share of expenses and losses. But in going concerns it is estimated that the member's stock is at least worth what he paid on it, and whatever more it may be worth is forfeited for expenses. In insolvent

Reddick, &c., v. The United States Building & Loan Assn.'s Assignee.

concerns it is to be assumed that there has been an impairment of the capital stock, growing out of losses in the conduct of the business, and the value of the stock can be determined only when the losses are ascertained and the funds ready for distribution.

So that the plan adopted in the Simpson case and other cases of going concerns can not be pursued here.

That the rule with respect to credits on stock payments in going concerns is different from that in the settlement of insolvent associations and those in process of liquidation is supported by abundant authority. *Hale v. Cairns*, Cent. Law J. of Feb. 24, 1899, (N. D., Nov., 1898) [77 N. W., 1010], and cases cited.

In *Williams v. Maxwell*, (N. C.), [31 S. E., 821], it was held that on the insolvency of the association a borrowing member should be charged with the amount borrowed, plus six per cent. interest, less the whole amount paid to the association on any and all accounts, plus his *pro rata* part of the defalcation account of the association.

See, also, *Strauss' case*, 117 N. C., 314, [53 Am. St. Rep., 585; 23 S. E., 450]; *Price v. Kendall*, (Tex. Civ. App.), [36 S. W., 810]; *Brown v. Archer*, 1 Mo. App., 465; *Weir v. Granite St. Prov. Association*, (N. J. Ch.), [38 Atl., 643].

The only question on this branch of the case is whether there is enough before the chancellor to approximate the value of the stock. It is clear that no answer universal in its application can be given to this question. It must depend on the character and division of the assets, and the probable losses in converting the securities of the concern into money. It will be conceded that if, after making a liberal discount on the paid-up value of the stock to meet the expenses and losses of winding up the concern, an approximate value can be fixed, which each member would receive on final distribution, it ought to be done.

In Endl. Bldg. Ass'ns, (2d Ed.), section 531, it is said: "There can, however, ordinarily be no reason why he (the borrowing member) should be put to the inconvenience of paying down the whole amount of his debt, without any credit for his stock payments, and relegated to a distribution of the corporate assets in order to get back what he might in the first instance have been permitted to retain. In general, the only effect of such rule, besides the distinct hardship upon the borrower, will be to swell the amounts passing through the receiver's hands, to complicate the accounts and the distribution, and thereby to increase the expenses of the settlement," etc.

"There can be no difficulty," continues the learned author, "in determining, or at least approximating, what receipts, profits and losses have been, what its liabilities are, and what is the value of every share of stock presently held advanced or unadvanced in it, and how much every member must lose upon every dollar paid in by him upon his stock, making a proper allowance for the expenses of settlement."

This rule was not approved or followed in the Rogers-Raines case for the reasons there given. Still, when possible of application, it should be adopted. It must, of course, be of limited application. In the first place, the court only in which the action of the receiver, or of the assignee for the benefit of the creditors, is pending, can determine even approximately the value of the stock. This is so in the very nature of things.

No other court can have knowledge of the facts necessary to be known before an attempt at such valuation can be made. And, if this knowledge might be obtained, yet if courts other than the one having jurisdiction of the settlement case undertook to fix such value, the

amounts so fixed might and likely would be different in the different counties, when it is, of course, absolutely necessary that the value fixed should be uniform. In the second place, as we have already indicated, the rule can be followed only where the extent of the losses and expenses of the settlement can be so surely estimated as to render it safe to fix an approximate value on the stock. And this must be left, in a large measure, to the sound judgment of the chancellor, having the whole case before him.

In the case before us the agreed facts are that at the date of the assignment the liabilities of the association to its stockholders, including an indebtedness of \$3,000 to outsiders, amounted to the sum of \$568,250, while its assets, as shown by its books, when purged of all usury, footed up \$479,995. These assets consisted of loans to its members, and, according to the statement of agreed facts, secured either by mortgages upon real estate or by stock of the company. To what extent loans were secured by stock of the company, we do not know. If there have been such loans, their amount and extent ought to have been shown; and it seems to us, also, that there ought to have been some proof, in a general way at least, as to the value of these securities.

The assignee expresses "an unwillingness to take the responsibility of fixing a value on the stock, or allowing any credit therefor on the loans." Unless, therefore, the borrowing members are sufficiently interested to make it reasonably certain by proof that such a value may be fixed, it can not be done. In view of the meager statements in the record before us, we can not say the chancellor was authorized to fix any approximate value on the stock for which the credit may be given the borrower.



There may be some other questions of minor importance presented in the pleadings, but no others are argued by counsel. On the appeal of Stofer, the judgment below is affirmed; on that of Reddick and wife it is reversed for further proceedings not inconsistent with this opinion.

## CASE 10—ACTION TO ENFORCE LIEN—MARCH 11.

## The Safety Building &amp; Loan Co. v. Ecklar.

## APPEAL FROM HARRISON CIRCUIT COURT.

1. USURY—BUILDING & LOAN ASSOCIATIONS.—The interest charged by a building and loan association to its borrowing members is usury if in excess of six per cent; and any act authorizing such associations to charge in excess of that amount is unconstitutional.
2. BUILDING AND LOAN ASSOCIATIONS—EXPENSE OF OPERATING.—A member of a going building and loan association is not chargeable with his proportionate share of the expense of carrying on the business, the profits of the investment being set off against the expense of operating; and the date of his ceasing to pay is a starting point for a new principal upon which interest is to be computed without any charge of expense.

L. H. JONES FOR THE APPELLANT.

1. Kentucky is the only State in the Union that has failed to sustain as constitutional an act similar to the Kentucky building association law. *Simpson v. The Ky. Citizens Bldg. Assn.*, 19 Ky. Law Rep., 1176.
2. Of the States which, like Kentucky, had applied to these associations the statutes against usury, holding that the contract between an association and a borrowing member is simply a lending and borrowing, which States include Connecticut, Nebraska, North Dakota, North and South Carolina, Pennsylvania and Texas, all of them have since enacted laws exempting associations from the operation of the statutes against usury, except only Texas and South Carolina, and the courts of all

106	115
108	188
108	293
108	296

108	115
120	799

106	115
138	662

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The Safety Bldg. & Loan Co. v. Ecklar.

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these States have sustained such acts as not being in violation of the provisions in their constitutions prohibiting local or special acts "to regulate the rate of interest" or to confer exclusive or special privileges, because, they hold, such acts are general laws, not local or special acts. *Rhodes v. Homerstown Assn.*, 82 Pa. St., 180; *Livingston Assn. v. Drummond*, 68 N. W. R., 375; *Vermont Trust Co. v. Whithed*, 2 N. Dakota, 82; *Mutual Assn. v. Wilcox*, 24 Conn., 147; *Savings Bank v. Allen*, 28 Conn., 97; *Holmes v. Smythe*, 100 Ill., 413; *Peoples Assn. v. Billings*, 104 Mich., 186.

3. The judiciary can not pronounce a statute unconstitutional and void because it may, in the opinion of the court be impolitic, unjust or oppressive, or because it appears to violate the genius and spirit of our institutions. And if there be a doubt on the subject it is the duty of the court to resolve it in favor of the validity of the statute. *Purnell v. Mann*, 105 Ky., 87.
4. Building associations are permitted to charge their borrowing members premium and interest in excess of the established rate of interest in all the States of the Union except only Kentucky, Texas and South Carolina. *Montgomery Mutual Bldg. & L. Assn. v. Robinson*, 69 Ala., 413; *Reeves v. Ladies' Bldg. Assn.*, 56 Ark., 335; *Mutual Savings Bank Bldg. Assn. v. Wilcox*, 24 Conn., 147; *Pabst v. Bldg. Assn.*, 1 McArthur, 385 (Dist. of Columbia); *Parker v. Fulton L. & Bldg. Assn.*, 46 Ga., 166; *Holmes, &c., v. Smythe, &c.*, 100 Ill., 413; *McLaughlin v. Assn.*, 62 Ind., 264; *Hawkeye Benefit & L. Assn. v. Blackburn*, 48 Iowa, 624; *Massey v. Bldg. Assn.*, 22 Kan., 624; *Amer. Homestead Co. v. Linnigan*, 46 La., Ann., 118; *Robertson v. Amer. Homestead Assn.*, 10 Md., 411; *Delano v. Wild, &c.*, 6 Allen, 1 (Mass.); *Bldg. & L. Assn. v. Billings*, 104 Mich., 187; *Central Bldg. & L. Assn. v. Lampson*, 60 Minn., 424; *Sullivan v. Assn.*, 70 Miss., 94; *Hammerslough v. Kansas City B. & L. Assn.*, 79 Mo., 84; *Livingston L. & Bldg. Assn. v. Drummond*, N. W. R., vol. 68, p. 375 (Neb.); *Shannon v. Dunn*, 43 New Hamp., 198; *Clarks-ville Bldg. & L. Assn. v. Stevens*, 26 N. J. Eq., 365; *Citizens Mutual L. Assn. v. Webster*, 25 Barb., 271, 355 (N. Y.); *Latham v. Washington Assn.*, 77 N. Car., 145; *Vermont L. & Trust Co. v. Whithed*, 2 N. Dakota, 82; *Rhodes v. Homerstown Bldg. & Sav. Assn.*, 82 Pa. St., 180; *Hagerman v. Ohio B. & S. Assn.*, 205; *Patterson v. Workingmen's Bldg. & L. Assn.*, 14 Lea, 677 (Tenn.); *White v. Mechanics Bldg. Fund Assn.*, 22 Grattan, 233 (Va.); *Pfeister v. Wheeling Bldg. Assn.*, 19 W. Va., 719.

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The Safety Bldg. & Loan Co. v. Ecklar.

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5. Building associations can not be operated on a basis of lending their money at six per cent., and the effect of the opinion in the Simpson case, if allowed to stand, will be, inevitably, to drive all associations of any consequence out of business.
6. Our statute books are full of acts which confer upon one class of corporations or individuals privileges or corporate powers not conferred upon other corporations or individuals, but the acts are not therefore unconstitutional, for the privileges they confer are not exclusive or special and the acts are not local or special, because they include all of the class to which they refer.
7. Borrowers in building associations are also stockholders and being stockholders are liable to pay their part of the expenses and share their part of the losses. *Simpson v. Ky. Citizens B. & L. Assn.*, 19 Ky. Law Rep., 1176; *Rogers, Recr., v. Rains*, 18 Ky. Law Rep., 768; *Henderson, &c., Assn. v. Johnson*, 88 Ky., 197; *Herbert v. The Association*, 11 Bush, 304.
8. In appellant association the amount which each holder of installment stock is to contribute to the expense fund is fixed by contract when he subscribes for the stock:
  - (a) By the by-laws, which in the face of the stock certificate he accepts, are expressly made a part of the certificate.
  - (b) By an endorsement on the certificate, in which it is stated what part of his monthly payments is to go into the expense fund and what part into the loan fund.

**SWINFORD & OSBORN FOR THE APPELLEE.**

This case in its essential features is controlled by the case of *Simpson v. Kentucky Citizens Bldg. & L. Assn.*, 19 Ky. Law Rep., 1176, and must be affirmed unless that case be overruled.

**JUDGE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

In this case we are asked to review the question of usury under our building and loan statute. We have the advantage of the brief of one who is familiar, not merely with the legal aspects of his client's cause, but familiar as well with the practical working of a successfully conducted modern building and loan association,—so successful indeed, that the association, in a long course of business,

has never declared less than a 13 per centum dividend. The real plea offered as a reason for a revision and reversal of the Simpson case (19 Ky. L. R., 1176), [41 S. W., 570, and 42 S. W., 834], is that the statute, as understood generally, has afforded an unusually profitable field for the investment of money secured by mortgage on real estate, and the opportunity, after legal advice, has been seized by thousands of investors. We do not mean to say that the advantages secured to the borrower by this system of investments has not been urged, but, with candor, counsel has conceded that the borrower pays excessive interest for these advantages.

Turning to the opening section of the statute (Ky. St., sec. 854), we find that "any number of persons not less than nine, may associate for the purpose of forming a corporation to accumulate the savings of its members paid into such corporation in fixed periodical installments, and lending to its members the funds so accumulated."

An appreciation of the objects and purposes of such an association, as they are set out in this initial section is presumably the consideration, in large measure, which induced the General Assembly to confer, or to attempt to confer, on such associations peculiar rights and powers in the collection of dues, interest, premiums, and fines, not conferred on, or common to, individuals or other corporations. We notice, as a matter of primary importance, the *source of the funds* of the organization. They are to consist of accumulations of "the savings of the members." This language would of itself imply a gradual accumulation or heaping up of the pittances or small contributions of the members. But, as if to leave no room for doubt here, the statute in express terms erects the entire superstructure on an accumulation of funds "paid into the cor-

poration in fixed periodical installments." This is a matter of vital moment, and so made by the very terms of the law.

When the principle is departed from, the organization becomes a mere money-lending, dividend-paying corporation, entitled to the equal protection of the law of the land with all other such corporations, and to no other. On this point the Supreme Court of North Carolina, in *Meroney v. Association*, 116 N. C., 898 [47 Am. St. Rep., 841; 21 S. E., 924], said of an association similar to appellant: "If we consider the manner in which its funds are to be raised, we find that it is not by accumulating of funds from monthly subscriptions or savings of its members, but mainly by inducing capitalists to invest their surplus in one or the other of the kind of stock provided in the following by-laws: '(2) Full-pay interest bearing stock in class B, which shall be sold at \$50 per share, and which shall bear interest at 6 per cent. per annum, payable semi-annually, on \$50 per share,' etc."

In a succeeding section of our statute we find authority for the issual of full-paid stock to members, but there is, we believe, no express power conferred to declare dividends in advance of maturity of stock. These features, however, are leading ones in the plans of the associations doing business in this State.

The appellants articles of incorporation provide that its stock may be fully paid for in advance, at not less than 50 per cent. of the par value of the stock, and the payment of annual or semi-annual dividends on such stock may be made, and different classes may be issued, on which monthly or other periodical payments of different amounts may be made; and the cor-

poration may also issue permanent nonwithdrawal investment stock, to be paid for at par value in advance.

Pursuant to these articles, by-laws were enacted providing that: "Single-payment stockholders should receive \$50 per share and 8 per cent. per annum interest; the semi-annual coupon dividends constituting a part of such interest. That full-paid stockholders should receive \$100 per share, and 8 per cent. per annum interest; the semi-annual coupon dividends constituting a part of such interest."

Other features of a kindred character are found, calculated manifestly to make the plan attractive to capitalists seeking unusually profitable investments. We regard these features as wholly foreign to the purposes and objects of a building and loan association. The exercise of these powers which are common to other corporations is a gross perversion of the spirit and design of such associations, and when they are exercised the distinctive features of such associations are so obliterated, or, speaking more accurately, so merged into the ordinary money-making corporation, that the institution is a building and loan society in name only.

Judge Endlich says: "As to participation in profits, which is but another name for the declaration and enjoyment of dividends, 'the scheme has reference to the final adjustment of accounts, not to any intermediate realization.'" And, speaking further as to the purposes of such an association, the same author says "To all practical intents, it may be said to be to enable a number of associates to combine and invest their savings to mutual advantage, so that from time to time any individual among them may receive, out of the accumulation of the pittance which each contributes

periodically, a sum, by way of loan, wherewith to buy or build a house. . . . It is only so far as they serve these purposes, and are confined to the objects legitimately involved therein, that the acts of building associations fall properly within the powers granted. As soon as they transgress these limits they are *ultra vires*."

Of course, if the laws governing the association authorize the exercise of the powers to which we have referred—of issuing paid-up stock and declaring dividends before "the final adjustment of accounts," of selling preferred stock and other powers common to corporations generally—it may not be said in strictness that such acts are *ultra vires* the corporation; but if the exercise of these powers puts the association into the same class and on a level with other corporations engaged in the business of lending money and selling stocks, then the same general laws should control the association as control other corporations engaged in the same or similar business.

It was in view of our conviction that these associations were exercising powers far beyond those which could be exercised as building and loan associations proper, and which placed them, in our judgment, on a level with other corporations engaged in loaning money and dealing in stocks, that induced us, in the Simpson case, to deny them the right to collect special and usurious rates of interest on their loans.

The question, in a sense, was one of fact as well as one of law. If we were right in the assumption that these associations were so engaged under legislative authority so empowering them, then the Legislature, we declared, was incompetent to confer such authority, and, we might have added, incompetent to make such a vicious, arbitrary and unnatural classification. We assert it to be

elementary that the true test whether a law is a general one, in the constitutional sense, is not alone that it applies equally to all in a class—though that is also necessary—but in addition, there must be distinctive and natural reasons inducing and supporting the classification. A law does not escape the constitutional inhibition against being a special law merely because it applies to all of a class arbitrarily and unreasonably denied.

Counsel says, "If a law applies to all of a class, and operates throughout the State, it is not local or special," and cites what he deems a noted authority on this point. "Interdicted special laws are those that rest upon a false or deficient classification. Their vice is that they do not embrace all of a class to which they are naturally related." *State v. Parsons*, 40 N. J. Law, 17.

The particular vice of the law under consideration in that case was that it did not embrace all of a class to which it naturally related. But we hold that a failure to embrace all of a class to which the proposed legislation naturally relates is not more fatal than if the legislation is so broad in its scope as to embrace objects not naturally and reasonably belonging therein. If the mechanics' lien law had been so drawn as to give liens on the debtor's property on debts due to bankers or merchants, the classification would have been faulty and vicious. And we are referred by counsel to this lien law as an instance of a general law, applicable to all of a class, which must be declared unconstitutional, if the general law applicable to all building and loan associations is to be deemed obnoxious to the Constitution as a special law.

We regard this lien law in favor of mechanics, however, as founded on a reasonable and natural classification. The statute creates no debt in favor of the mechanic, but gives



the workman an additional remedy merely for its enforcement. It is founded upon natural justice, and rests on the principle that when a mechanic or materialman incorporates into the property of another his own labor or material he has himself a qualified property therein, which he is allowed to follow. The expenditure of his time and labor results in an accession to the property and enhances its value, and the statute which favors the workman or materialman makes a natural, appropriate, and reasonable classification.

In *State v. Hammer*, 42 N. J. Law, 435, it is said: "But the true principle requires something more than a mere designation by such characteristics as serve to classify, for the characteristics which thus serve as the basis of classifications must be of such a nature as to make the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject-matter of the proposed legislation, between the objects embraced in, and those excluded from, such legislation."

The provisions of chapter 56, under which appellant organized, do not confer the powers authorized by its articles of incorporation and its by-laws. It may be that the act of 1882 (Gen. St., p. 773) does so in part. But conceding that the General Statutes and the act referred to, together with the provisions of our present general corporation law, do confer these powers, directly or indirectly, and that they are powers incident to corporations generally, we are fully convinced that no such powers are compatible with the aim and design of building and loan associations as in fact intended to be authorized by the Legislature. And, moreover, to the extent that such powers are conferred, the Legislature thereby destroyed the distinc-

tive marks which characterize building and loan associations. And when on this hybrid it attempted to confer special privileges, it went beyond its constitutional power.

Coming now to the additional question raised on this appeal, we find the appellant contends that under the former decisions of this court the borrower is chargeable with his proportionate share of the expenses of carrying on the business of the association whilst he was a member. When the concern has ceased to be a "going one," and its affairs are being wound up, there is no sort of doubt that the borrower must share his *pro rata* part of the losses and expenses of winding up. When the concern is going, however, a different rule seems to apply. It may be that the same rule, theoretically, applies, but it seems to be assumed that the profits of the investment in the stock of a going concern are set off against the borrower's share of the cost of maintaining the organization.

At any rate, whether this is the reason or not, the rule is that on being sued the borrower is chargeable with his loan and legal interest and fines, unless the latter are excessive and oppressive, and is credited with all payments, whether made as dues, premiums, or interest.

In this case it appears that the profits distributed on the borrower's stock are within a dollar or so of appellee's share of the expense of the concern, as charged by appellant, up to the time appellee ceased to pay his dues, interest and premium. These profits are not credited to appellee in the judgment below, nor is he charged with the expense; and in this respect there can be no complaint by either party. But appellant seeks to continue the charge of ten cents per month on each share of stock held by appellee from the time he quit paying, viz., from October, 1896, until this suit was instituted.

We are inclined, however, to regard the date at which

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

appellee quit as the starting point for a new principal, on which interest only is to be computed and added thereto, without further charge for expense. In effect, this failure to pay may be regarded as terminating the borrower's connection with the company as a stockholder, and he thereafter obtains no benefits, and shoulders no burdens.

The judgment below conforms to these views, and is therefore affirmed.

CASE 11—STREET IMPROVEMENT—MARCH 11.

Gleason, Etc. v. Barnett, Etc.  
City of Louisville v. Gleason, Etc.

106	125
111	610
111	615
111	624
106	125
el17	788

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. MUNICIPAL CORPORATIONS—CITIES OF THE FIRST CLASS—STREET IMPROVEMENTS.—An ordinance for the construction of a carriage way on Highland avenue in the City of Louisville providing that said carriage way should be thirty feet in width and should be improved by grading, curbing and paving with vitrified pavement or block pavement with corner stones at the intersections of streets and alleys and foot-way crossings across all intersecting streets and alleys, in accordance with the designs and dimensions shown upon the drawings on file in the office of the board of public works and as designated in the ordinance entitled "An ordinance concerning the improvement of streets with vitrified brick or block pavement," and at the cost of the owners of ground in, a defined boundary upon Highland avenue, the cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the defined boundary, is not invalid either first, in attempting to charge the whole cost of the work including the carriage way and curbing to a defined tax district by the square foot, or, second, in failing to make any provision for the additional charge of twenty-five per cent. against corner lots.

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

2. SAME.—An allegation in the petition for the enforcement of a street assessment that the ordinance for same was passed on the recommendation of the board of public works is conclusive in the absence of any denial that the board of public works recommended the passage of the ordinance.
3. SAME.—If the ordinances for the construction of Highland avenue were defective for either of the causes set out in paragraph one herein, the defect could be remedied by the chancellor by the express provisions of section 2834 Kentucky Statutes.
4. RES ADJUDICATA—DISMISSAL ON DEMURRER.—The dismissal of the action against the property owners on demurrer was not a decision of the case upon its merits and the judgment against the city was premature.

LANE & BURNETT FOR GLEASON, &c.

If it be that the property owner is not responsible, then it is clear that the municipality is, because the ordinance for the improvement and the contract for the improvement were passed and entered into after April 1st, 1880, and prior to July 1st, 1893. *City of Louisville v. Meyer*, 17 Ky. Law Rep., 666.

H. L. STONE, CITY ATTORNEY, FOR THE CITY OF LOUISVILLE.

The ordinance for the construction of Highland avenue was legally passed. It passed one board on the 29th of September, 1892, and the other on October 13, 1892. The decision of the court below that two weeks did not lapse between this action of the two boards was erroneous. *Fehler v. Gosnell*, 99 Ky., 380.

T. L. BURNETT, JOHN ROBERTS AND H. H. HERR FOR THE APPELLEES. (BARNETT, MILLER & BARNETT OF COUNSEL.)

1. If a city ordinance is repugnant to the charter of the city, it is necessarily null and void. Ky. Stats., sec. 2833 (sec. 70, city charter); sec. 2826 (sec. 64 city charter); *Stone's Ordinances of 1897*, p. 22; *Caldwell v. Rupert*, 10 Bush, 179; *Craycraft v. Selvage*, 10 Bush, 696; *Reed v. Toledo*, 18 Ohio St., 161; *Vance v. Little Rock*, 30 Ark., 435; *R. R. Co., v. Alexandria*, 17 Gratt. (Va.), 176; *Nelson v. Laporte*, 33 Ind., 258; *State v. Hoboken*, 33 N. J. Law, 280; *Elliot on Streets and Roads*, pp. 371-2, 373-4; *City of Burlington v. Keller*, 18 Iowa, 65; *Wood v. Brooklyn*, 14 Barb., 425; *Cullinan v. New Orleans*, 28 La. Ann.,

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

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- 102; *Livingston v. Albany*, 41 Ga., 21; *Indianapolis v. Gas Co.*, 66 Ind., 396; *Pesterfield v. Vickers*, 3 Cold. (Tenn.) 205; *Haywood v. Savannah*, 12 Ga., 304; *Judson v. Reardon*, 16 Minn., 341; *Com. v. Turner*, 1 Cush, 493; 17 Am. & Eng. Enc. of Law, 251; *Thompson v. Schermerhorn*, 6 N. Y. (2 Sheld), 95; s. c. 55 Am. Dec., 385; *Davis v. City of Leitchfield*, 145 Ill., 313; s. c. 33 N. E. R., 888.
2. Although from the record an appellate court will have to reverse a case, where the record clearly shows that the cause can be decided on its merits, the appellate court will direct the lower court what judgment to enter. *Whittemore v. Stout's Admr.*, 7 Dana, 236; *Shropshire v. Reno*, 5 Dana, 584; *Elliott on Appellate Procedure*, sec. 567; *McAfee v. Reynolds*, 23 N. E. R., 425 (Supreme Court of Indiana); *Lemke v. Daegling*, 52 Wis., 500.
3. By the charter of cities of the first class the property owners are liable for the construction of a street, but not for a reconstruction thereof, as the charter provides that it is the duty of the city at large to maintain and reconstruct streets. *Ky. Stats.*, sec. 2833 (city charter, sec. 70); *Acts of Ky. Legislature*, 1869-70, vol. 2, p. 37; *Lucas' Digest*, p. 14; *Acts*, 1881-2, vol. 1, p. 408; *Burnett's Code*, p. 506; *Acts* 1891-2-3, p. 1265, *et seq.*; *Ky. Stats.*, 2836; *Burnett's Code*, p. 735, secs. 84 to 96; *Fox v. Middleborough Town Co.*, 96 Ky., 262; s. c. 16 Ky. Law Rep., 455; s. c. 28 S. W. R., 776; *Dulaney v. Bowman*, *Burnett's Code*, p. 540; *Hammett v. Philadelphia*, 65 Pa. St., 146; *Williamsport v. Beck*, 128 Pa. St., 147; *City of Harrisburg v. Segelbaum*, 151 Pa. St., 172; *Philadelphia v. Ehret*, 153 Pa. St., 1.
4. Delegated authority can not be delegated, so when a board of public works attempts to confer its duties upon any one member, all the proceedings thereafter become nugatory. *Ky. Stats.*, secs. 2826, 2806, 2804, 2803, 2805, 2833, 2832, 2834, 2835, 2836; *Hydes v. Joyce*, 4 Bush, 464; s. c. 96 Am. Dec., 311; *Detroit Young Men's Society v. Mayor of Detroit*, 3 Mich., 173; *Rice v. Richardson*, 1 Western Law Journ., 395; *Tidd v. Rines*, 26 Minn., 201; *Keith v. Hayden*, 26 Minn., 212; "Recommend" as defined by *Webster*; *Caldwell v. Rupert*, 10 Bush, 179; *Preston v. Roberts*, 12 Bush, 570; *City of Burlington v. Keller*, 18 Iowa, 65; *Wood v. Brooklyn*, 14 Barb., 425; *Cullinan v. New Orleans*, 28 La. Ann., 102; *Livingston v. City Council*, 41 Ga., 21; *City of Indianapolis v. Gas Light & Coke Co.*, 66 Ind., 396; *Pesterfield*

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

- v. Vickers, 3 Cold. (Tenn.), 205; Haywood v. Savannah, 12 Ga., 304; Davis v. City of Leitchfield, 145 Ill., 313; s. c. 33 N. E. R., 888; Judson v. Reardon, 16 Minn., 341; Com. v. Turner, 1 Cush., 493; 17 Am. & Eng. Ency. of Law, 251-2; Thompson v. Schermerhorn, 6 N. Y., 96; Craycraft v. Selvag, 10 Bush, 696; Worthington v. Covington, 22 Ky., 265; Broadway Baptist Church v. McAtee, 8 Bush, 508; s. c. 8 Am. Rep., 480.
5. To impose burdens upon lot owners for municipal improvements, the law relating to the giving notice must be strictly complied with. Where this is not done, the lot owner can not be held liable for a street assessment, Ky. Stats., sec. 2829; Hydes v. Joyce, 4 Bush, 464; s. c. 96 Am. Dec., 311; Thompson v. Schermerhorn, 6 N. Y., 92; s. c. 55 Am. Dec., 385; French v. Edwards, 13 Wall., 506; Com. v. Mitchell, 3 Bush, 25; s. c. 96 Am. Dec., 192.
6. Where a city charter provides that the lot owner shall be liable for the construction of a street, and the city at large for the reconstruction, the city has no power to require the contractor for constructing a street to give bond, that he will keep the same in repair for five years, as that imposes the duty of reconstructing the street upon the property owners. Louisville v. Henderson, 5 Bush, 515; Covington v. Dressman, 6 Bush, 211; Ky. Stats., sec. 2833; Brown v. Jenks, 98 Cal., 10; s. c. 32 Pac., 10; Burnett v. Lewellyn, 32 Pac., 70; Excelsior Pav. Co. v. Leach, 34 Pac., 116; Same v. Pierce, 33 Pac., 727; Brown v. Baker, 33 Pac., 728; Brown v. Winship, 33 Pac., 728; People v. Maher, 56 Hun, 83; McAllister v. Tacoma, 37 Pac., 447; Fehler v. Gosnell, 99 Ky., 380; Boyd v. Milwaukee, 92 Wis., 458; Schnectady v. Trustees of Union College, 66 Hun, 179; Same v. Same, 144 N. Y., 241; Morse v. Westport, 110 Mo., 502; Vardin v. St. Louis, 131 Mo., 26; s. c. 33 S. W., 493; "Maintain" as defined by Webster and Worcester; Moon v. Durden, 2 Exch., 21; Railroad v. Goodman, 4 N. E. R. (Ind.), 163; "Repair" as defined by Webster; Street Railway Co. v. Galveston, 69 Tex., 663; Railroad v. Pittsburg, 80 Pa. St., 76.
7. In street assessments no greater number of square feet can be taxed on one side than on the other. Preston v. Roberts, 12 Bush, 570; Loeser v. Redd Bros., 14 Bush, 18.
8. If a contractor has placed it out of his power to compel a proper distribution of the assessment, he is estopped to claim enforcement as to others.

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

9. It is against public policy for a street contractor and his surety to be partners.
10. The assertion of a lien on real property for street improvements is a cloud upon the title of the lot owners, and when so asserted unjustly, a bill will lie in equity to cancel the same.' *Marvin v. Saratoga*, 56 Hun, 510; *Dudley v. Frankfort*, 12 B. M., 610.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This action is brought against property owners to recover the cost of improving Highland avenue from the north-easterly line of East Broadway to the center line of Everett avenue, if extended. The ordinance providing for the improvement reads as follows: "That the carriage-way of Highland avenue, from the northeasterly line of East Broadway to the center line of Everett avenue (if extended), shall be thirty (30) feet in width, and shall be improved by grading, curbing, and paving with vitrified brick or block pavement, with corner stones at the intersection of streets and alleys, and footway crossings across all intersecting streets and alleys. Said work shall be done in accordance with the designs and dimensions shown upon the drawings on file in the office of the Board of Public Works, and as designated in an ordinance, entitled 'An ordinance concerning the improvement of streets with vitrified brick or block pavement,' approved the 5th day of February, 1894; and at the cost of the owners of ground on the northwesterly side of Highland avenue between East Broadway and a line at right angles to Highland avenue, passing through a point where the center line of Everett avenue (if extended) would intersect the northwesterly line of Highland avenue and extending back to a line two hundred and thirty-five feet distant from, and parallel to, Highland avenue, and on the southeasterly side of Highland avenue, between East Broadway and Everett avenue, and extending back to a line two hundred and thirty-five

feet distant from, and parallel to, Highland avenue; the cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties, respectively, within the limits above set out, and that all ordinances in conflict herewith be, and are hereby, repealed."

The principal objections urged to the validity of the ordinance are: (1) It attempts to charge the whole cost of the work, including carriageway and curbing, to the defined tax district, by the square foot; (2) in failing to make any provision for the additional charge of 25 per cent. against corner lots; (3) that the Board of Public Works did not recommend the passage of the ordinance.

The general council, in passing the ordinance, was controlled by section 2833, Kentucky Statutes, which reads as follows: "When the improvement is the original construction of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the Board of Public Works according to the number of square feet owned by them respectively, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay 25 per cent. more than others for such improvements. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square. When the territory contiguous to any public way is not defined into squares by principal streets, the ordinance providing for the improvement of such public ways shall state the depth, on both sides fronting said improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties respectively, within a depth as set out in the ordinance." It is averred in the petition that



the improvement was the original construction of the street; that the territory contiguous to the street where the improvement was made was not defined into squares by principal streets; that the ordinance fixed the depth, on both sides fronting the improvement, to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respectively, within the depth which was designated in the ordinance.

We will consider the objections urged to the validity of the ordinance in the order stated:

1. When the improvement is an original construction, it is made at the exclusive cost of the owners of lots. When the territory which shall comprise the taxing district is bounded by principal streets, the Board of Public Works is required to apportion the cost to the owners of the lots in each fourth of a square according to the number of square feet owned by them, respectively, except that corner lots of certain dimensions shall pay 25 per cent. more than others for such improvement. It is within the power of the general council, by ordinance, to declare where the improvement shall be made, and how it shall be made; but the General Assembly has declared how the cost shall be apportioned when the territory is defined into squares by principal streets, and that it shall be done by the Board of Public Works. The General Assembly has likewise provided how the territory contiguous to a public way, which is not defined into squares by principal streets, shall bear the burden of an improvement of a street by original construction. When such is the case, the general council, by ordinance providing for the improvement, is required to state the depth, on both sides fronting the improvement to be assessed for the cost of making the same, according to the number of square feet owned by the parties, respect-

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

ively, within the depth as set out in the ordinance. The ordinance in question did this in full compliance of the requirements of the statute.

2. While the ordinance says the cost of improvement is to be equally apportioned among the owners of property, according to the number of square feet of ground owned by the parties, respectively, within the limits designated, still, if the language of the ordinance indicates the general council attempted to regulate the cost of curbing, it amounts to a mere expression of opinion that the curbing should be paid for by the parties owning the lots according to the number of square feet owned by them.

Section 2835, Kentucky Statutes, regulated, at the time of the improvement, the cost of making curbing, and which required it to be apportioned to the front foot as owned by the parties, respectively, fronting on the improvement, except that each corner lot shall pay the cost of its sidewalk intersection. The mere fact that the general council may have entertained an erroneous opinion as to how the cost of curbing should be apportioned does not, in the slightest degree, affect the validity of the ordinance, in so far as it orders the improvement and defines the boundary of the territory which is to pay the cost of it.

3. The objection urged to the validity of the ordinance, that the Board of Public Works did not recommend its passage, is fully answered by the statement that it is expressly alleged in the petition that the ordinance was passed on the *recommendation* of the Board of Public Works. If what we have said does not sufficiently answer the objection urged, a complete answer thereto is made in section 2834, Kentucky Statutes, wherein it is said: "Payments may be enforced upon the property bound therefor by proceedings in court; and no error in the pro-

ceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned."

It is averred that the work contemplated by the ordinance was done as required by the contract. The manifest purpose of the Legislature, in the use of the language quoted, was to modify the rule of strict construction with reference to the statutes and proceedings thereunder, imposing burdens upon the taxpayer for the improvement of public ways, and to establish a rule which would authorize the *general council, or the courts* in which suits might be brought, to enforce claims against property owners, to make *all corrections and rules and orders*, so as to do *justice* to all parties concerned, where it appeared the improvement had been made as required by either the *ordinance or contract*.

The appellants Gleason and others filed a demurrer to the answer of the defendants and the court made it relate to the petition, and sustained it thereto. The appellants Gleason and others amended their petition, and the defendants filed a demurrer to it as amended, which the court sustained, and, declining to plead further, it was dismissed. The court rendered judgment against the city for the cost of the improvement, although the case was not disposed of upon its merits.

Notwithstanding it was averred in the petition that the improvement was an *original construction*, the court adjudged that it was a *re-construction*, and for that reason gave judgment against the city. This was error. If the city is, or can be made liable for the cost of the improvement, the case had not reached that stage which au-

Gleason, &c., v. Barnett, &c.. City of Louisville v. Gleason, &c.

thorized the court to render judgment against it. The question as to whether the answer states a defense is not before us.

The judgment is reversed on each appeal for proceedings consistent with this opinion.

JUDGE PAYNTER'S RESPONSE TO PETITION FOR A REHEARING.

The ordinance under which the improvement was made passed the lower board of the general council on September 29, 1892, and the upper board on October 13, 1892. Part of the city charter which was in force at the time the ordinance was passed reads as follows: "But no ordinance for any original improvement mentioned in this act, shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other."

Counsel contends that the ordinance is void because two weeks did not elapse between the passage of the ordinance from one board to the other. This precise question was decided in *Fehler v. Gosnell*, 99 Ky., 380 [35 S. W., 1125]; the court holding that an ordinance which passed the lower board of the general council on April 5th, and the upper board on April 19th, was a compliance with the statutory provision. The court erred in sustaining a demurrer to the petition, and in dismissing it against Barnett and rendering judgment against the city for the amount of the claim sought to be recovered against him. If *Gleason et al.* are entitled to recover against the city at all (which it is not necessary for us to decide here), the time to do so had not arrived, and it may be finally determined that Barnett's property is liable for the payment of the claims in suit.

The judgment on each appeal is reversed for proceedings consistent with this opinion.

## CASE 12—ACTION FOR USURY—MARCH 14.

## Payne v. Henderson.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

**USURY—LOAN THROUGH BROKER.**—A loan of money at seven per cent., the lender receiving six per cent. and the broker through whom the loan was effected receiving one per cent., was usurious and rendered the lender liable for the excess. In such case it is held that the broker was agent for the lender.

JOHN MASON BROWN AND E. L. McDONALD FOR THE APPELLANT.

1. Usury may be recovered as long as it can be traced, whether exacted by the lender or by the agent of the lender. Bank of U. S. v. Owens, 2 Peters (U. S.), 531; Smith v. Berry, 5 B. M., 317; Rudd v. Planters' Bank, 78 Ky., 513; Fitzpatrick v. Apperson, 79 Ky., 272; Magill v. Mercantile Trust Co., 81 Ky., 130.
2. Where a lender of money pays her agent nothing for the services, she will be presumed to know that they were collecting fees or commissions from the borrower. Bank v. Flint, 54 Ark., 40.
3. A loan made by the regular agents of the lender by which the borrower was to pay such agent a certain sum for his commission in addition to the highest legal rate of interest is usurious where there was a previous agreement between the lender and his agent that the latter would act as his agent but would obtain compensation for his services as such agent by way of commissions exacted from the borrower. Fowler v. Equitable Trust Co., 141 U. S., 385; Whaley v. Amer. F. L. Mort. Co., 74 Fed. Rep., 73; Payne v. Newcomb, 100 Ill., 611; Texas Loan Agency v. Hunter, 35 S. W. R., 399; Dayton v. Dearholt, 55 N. W. R., 147.
4. A loan of money is usurious where it appears that the lender was to receive excessive interest, or that a bonus or commission was paid to the agent of the lender with his knowledge or under circumstances from which his knowledge will be presumed, which commission when added to the interest will exceed the

## Payne v. Henderson.

lawful rate of interest. *Bank v. Flint*, 54 Ark., 40; *Borschelling's Exr. v. Trefz*, 4 N. J. Eq., 502.

5. An assignment signed by the borrower in which he agrees to retain as his agent the agent of the lender and to pay said agent a commission, is void and will in no way bar or prejudice his right to recover usury so paid by him. *Bank v. Flint*, 54 Ark., 40; *Sherwood v. Roundtree*, 32 Fed. Rep., 113; *New Eng. Mortgage Co. v. Hendrickson*, vol. 14 "Reporter."
6. Even if the agent of the lender disobeyed the positive instruction of the lender and collected usury in the guise of fees or commissions the lender is liable. *Stephens v. Olsom*, 64 N. W. R., 898; *Fitzgerald v. Maupin*, 5 Ky. Law Rep., 242.

## DODD &amp; DODD FOR THE APPELLEE.

The payment of the \$375 to Buckner, Cummins & Co. was made by the borrower as an independent transaction and in the transaction the brokers were not acting as the agents of Mrs. Henderson. 27 Am. & Eng. Ency. of Law, pp. 1003, 1004; *Mechem on Agency*, sec. 475; *George v. New England Security Co.*, 20 So. Rep., 32; *Thruston v. Cornell*, 38 N. Y., 281; *Eldridge v. Reed*, 2 Sweeney (N. Y.), 155; *Merck v. Am. Freehold Land Mort. Co.*, 79 Ga., 213; *Attillie v. Waechter*, 33 Wis., 253; *Crane v. Hubble*, 7 Paige (N. Y.), 413; *Beadle v. Munson*, 30 Conn., 175; *Wyllis v. Ault*, 46 Iowa, 46; *Grant v. Phoenix Life Ins. Co.*, 121 U. S., 118; *Call v. Palmer*, 116 U. S., 98; *Dryfus v. Burns*, 53 Fed. Rep., 420; *Wheley v. Am. Freehold Land Mortgage Co.*, 74 Fed. Rep., 73.

## JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

The appellant, J. B. Payne, brought this action seeking to recover of appellee the sum of \$375, alleged to have been paid by him to appellee, in excess of the principal and legal interest, on a debt due appellee for loaned money. The issue presented is one of law rather than of fact. The facts as proven, and about which there is scarcely a dispute, are these: In 1891, Buckner & Cummins, a firm of brokers in Louisville, had a notice in one of the papers that they loaned money at seven per cent. Ap-

pellant, seeing this notice, applied for a loan of \$7,500 for the term of five years. At that time, and for some time before, this firm of brokers, together with an attorney in Louisville, had an arrangement with the appellee to lend money for her on real estate. Appellee furnished the money to the brokers, and they took mortgages, with notes and interest coupons attached, at six per cent. These notes and interest at six per cent. were paid to appellee, and this is all she ever received; and she did not pay to the brokers or attorney any thing for their services, either for drawing the mortgage and notes, or for inspecting the property or its title. She received net six per cent. on her money loaned. Appellee did not know at what rate the loan was made to the borrower. But the proof shows clearly that it was understood between the appellee and the brokers and attorney that for their services the borrower would pay. When appellant applied for this loan to the brokers he was informed that they would exact of him \$15 for expenses in visiting the land to appraise same, and to go to examine the title. This was paid, and about this there was no complaint. Appellant was also compelled to pay \$375, the amount sued for, out of the loan. This is one per cent. on \$7,500 for five years. This sum of \$375 was retained by the brokers and attorney as commission and fees for their services about the loan. The proof shows clearly that this \$375 was deducted from the loan of \$7,500, and was retained by the brokers and attorney. No part of it was ever returned or paid to the appellee. The interest coupons and the principal debt were paid in full to appellee, except about \$140, which is not pleaded as an offset or counter-claim.

The question then presented is: Can appellant recover

the \$375 paid in excess of the legal rate of interest? Is it usury paid?

It is clear from the proof that the brokers, Buckner & Cummins, as well as the attorney represented the appellee in the negotiations for and consummation of the loan. They were her agents to see that the security offered was ample, that the title was perfect, and that the mortgage was correctly drawn and bound the property. Representing appellee as they did, they could not also at the same time represent appellant.

There was no obligation resting on appellant to pay the agents of appellee, but this obligation rested on appellee herself.

The proof shows that appellee must have known that the borrowers of her money were paying her agents for their services, for she did not pay them.

In the case of *Fowler v. Equitable Trust Co.*, 141 U. S., 384, [12 Sup. Ct., 1], the Supreme Court, in a case very similar to this one, said, by Justice Harlan: "We, therefore, hold that the exaction by the trust company's agent, pursuant to his general arrangement with it, of commissions over and above the ten per cent. interest stipulated to be paid by the borrower, rendered this loan usurious."

In the case of *Banks v. Flint*, 54 Ark., 40, [14 S. W., 769], a case very similar to this one, the court said: "To sustain the plea of usury, it must appear that excessive interest, was paid to the lender, or that a bonus or commission was paid to the agent of the lender with his knowledge, or under circumstances from which his knowledge will be presumed, which commission, when added to the interest paid or to be paid the lender, would exceed the lawful rate. . . ." Concluding, the court says: "But it also knew that the services had been ren-



dered, that it had enjoyed the benefit thereof, and that it had paid nothing therefor. This would give it reasonable notice that the borrower, the only other person interested, had paid for it." The court adjudged the transaction usurious.

In the case of Fitzgerald, Trustee, v. Maupin's Adm'r, reported 5 Ky. Law Rep., 242, decided by this court September 15, 1883, the facts appeared that Maupin executed his note for \$3,500 and actually received only \$2,956.50, together with \$24 paid for insurance, the difference being \$519.50. Of this sum of \$519.50, the sum of \$117.50 was for commissions to Roe & Lyon, brokers, who negotiated the loan, and the balance was discount or interest paid in advance. The court held the transaction usurious as to the whole sum of \$519.50, and said: "The decedent having paid the interest up to his death, the proper judgment for the court below to render was in giving to the appellant interest at six per cent. on the amount of money received by the appellee's intestate. The court will not stop to inquire whether Roe & Lyon were the agents of the one party or the other, as the statement of the case is conclusive of the object in view by the party making the loan."

The reasoning of these cases, and of others that might be cited, seems to be conclusive of the question. It is plain to us that this transaction as made was but a device intended to evade the usury laws. The brokers notified the public that they would lend money at seven per cent. interest. This is the exact amount charged appellant, and for the excess over six per cent.—\$375—appellant is entitled to recover.

Judgment reversed, and cause remanded, with directions to render judgment for appellant, and for further proceedings consistent herewith.

108	140
108	188
p108	201
108	140
e118	408

108	140
f131	638

CASE 13—RESCISSION FOR FRAUDULENT MISREPRESENTATION—MARCH 14.

Livermore v. Middlesborough Town Lands Co.

APPEAL FROM BELL CIRCUIT COURT.

**RESCISSION—FRAUD AS GROUNDS OF.**—In order to establish fraud against which equity will relieve, it must appear that the misrepresentation was a material fact (as distinguished from opinion), at the time or previously existing, and not a mere promise for the future; such misrepresentation must be relied upon by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not justify a belief of its truth. Tested by this rule the defendant failed to make out a case of fraud entitling him to a rescission of his contract of purchase.

G. W. SAULSBERRY FOR THE APPELLANT.

1. The facts developed by the testimony show actual fraud on the part of the promoters of the Middlesborough Company in the contract in which the notes sued on were executed.
2. If a statement of fact actually is not true, is made by a person who honestly believes it to be true, but under such circumstances as devolved upon him the duty of knowing its truth, such representations are fraudulent in equity, as nothing overcomes a pre-existing duty of knowing and telling the truth.

Citations: *Peyton v. Butler*, 3 Hayw., Tenn., 141; *Barnard v. Rorer Iron Co.*, 1 Pickle, 139; *Smith v. Harrison*, 2 Heiskill, 241; *Lewis v. McLemore*, 10 Yerger, 238; *Baldwin v. Franklin*, 8 Lea, 67; *Bigelow on Frauds*, 484; 50 *American St. Rep.*, 285; 3 *Yerger*, 178; 50 *Am. Dec.*, 130; 2 *Pom. Eq. Jur.*, 879-880; *Cooley on Torts*, 494, 501; 8 *Am. & Eng. Ency. of Law*, 642; *Bigelow*, 497-535, 44, 5; *Lawson R. R. & P.*, 2356, 2342; *Bullett v. Farran*, 18 *Am. St. R.*, 485; *Haxter v. Bast*, 11 *Am. St. R.*, 877; *Winston v. Gwathmey*, 8 *B. M.*, 19; *Babcock v. Case*, 61 *Pa. St.*, 427; *Prewitt v. Trimble*, 92 *Ky.*, 176; 36 *Am. St. R.*, 586; *Greenleaf on Ev.*, 1 vol., 441; *Rohrschneider v. Knicker-*

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Livermore v. Middlesborough Town Lands Co.

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bocker Ins. Co., 76 N. Y., 200-16; 2 Pom., 88; Carter v. McNutt, Trustee, 13 Ky. Law Rep., 922.

C. C. TURNER ON THE SAME SIDE. (GEO. W. SAULSBERRY OF COUNSEL.)

1. In support of the second point made by Mr. Saulsberry, counsel cited: Tiedeman on Sales, p. 161, sec. 160; Prewitt v. Trimble, 92 Ky., 176; Bigelow on Fraud, vol. 1, p. 411, 414, 415; Pendaris v. Gray, 41 Tex., 326; Wilson v. Carpenter, 91 Va., 183; Carter v. McNutt, 13 Ky. Law Rep., 879; Bigelow on Fraud, p. 425; Tarkington v. Parvis, 128 Ind., 182.
2. In response to the point made in oral argument that appellant was estopped by his connection with the appellee company to plead the fraud which was practiced upon him by it, counsel urged that appellant had no sort of connection with any of said corporations at all after the sale of lots which was sought to be rescinded.

J. R. SAMPSON FOR THE APPELLEE. (J. W. ALCORN, J. H. TINSLEY, CHAPMAN & SAMPSON, OF COUNSEL.)

From the papers as shown in the record, there has been no fraud perpetrated by this company upon appellant in this transaction. Pidcock v. Swift, 51 N. J. Eq. (6 Dickinson 405); Tinsley v. Ogg, 7 Dana, 385; 21 Am. & Eng. Ency. of Law, 84-90; 2 Pom. Eq., 881; 8 Am. & Eng. Ency. of Law, 653; notes; Musick v. Gatzmeyer, 47 Ill. App., 329; 8 Am. & Eng. Ency. of Law, 637; Southern Development Co. v. Silva, 125 U. S. Supt. Ct., 680; Pom. Eq., secs. 855, 856; Jasper v. Hamilton, 3 Dana, 284; Wakeman v. Dalley, 51 N. Y., 27; Marsh v. Falker, 40 N. Y., 566; Meyer v. Amidon, 45 N. Y., 169; Kuntz v. Kennedy, 79 N. Y. Sup. Ct., 314; Wade v. Ringo, 25 S. W. R., 907; Breemersch v. Linn, 59 N. W. R., 314; Lawson's Rights, Remedies and Practice, vol. 5, secs. 2344, 2345; Brandt Surety & Guaranty, sec. 404; First Natl. Bank of Stanford v. Mattingly, 14 Ky. Law Rep., 69; Sawyer v. Prickett, 86 U. S., 107; Ball v. Lively, 4 Dana, 370; Tanner v. Clark, Carter v. McNutt, 13 Ky. Law Rep., 922; Huls v. Black, 14 Ky. Law Rep., 805; Turner v. Cape Fear Co., 2 Devereux, 239; 61 Penn. St. R., 427; 10 Yerger, 238; 3 Yerger, 178; 3 Hayward 141; 1 Pickle, 141; 2 Helskell, 243; 18 Am. St. R., 485; 11 Am. St. Rep., 877; Prewitt v. Trimble, 92 Ky., 176; Stewart v. Dougherty, 3 Dana, 481;

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Livermore v. Middlesborough Town Lands Co.

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Buford v. Brown, 6 B. M., 553; Marksbury v. Taylor, 10 Bush, 520; Campbell v. Hillman, 15 B. M., 518; Phelps v. Quinn, 1 Bush, 378; English v. Thomasson, 82 Ky., 280; Nell v. Nell, 16 Ky. Law Rep., 195; Rufner v. Riley, 81 Ky., 166; Wood v. Wood, 78 Ky., 628; Fisher v. May, 2 Bibb., 450; Gore v. Peak 15 Ky. Law Rep., 279; Brannin & Co. v. Loving, &c., 16 Ky. Law Rep., 331; Trimble v. Reid, 17 Ky. Law Rep., 494; Same v. Ward, 17 Ky. Law Rep., 509; Banque Franco, &c., v. Browne, 34 Fed. Rep., 190; Ewing v. White, 6 Fed. Rep., 451; Slaughter v. Gerson, 13 Wallace, 235; Company v. Newland, 39 Pac. Rep., 36.

**CHAPMAN & SAMPSON IN A SUPPLEMENTAL BRIEF FOR THE APPELLEE.**

1. Under the pleadings the judgment is correct and should be affirmed regardless of evidence. The plea of estoppel should be sustained.
2. The appellant can not be heard to ask a rescission because he has ratified the contract and because he has waited too long and because his counter-claim for rescission is not good in that it fails to show prompt intention to disavow the contract.
3. If all representations and promises which failed of performance were representations and promises and mere statements of hopes and expectations, and not made with purpose of deceiving, but in good faith, they can not be made the basis of an action or defense.
4. There is an entire failure of proof of fraud in the failure to prove knowledge that the statements were not true or intended to deceive.

Citations: Stewart v. Dougherty, 3 Dana, 481; Ball v. Lively, 4 Dana, 373; Buford v. Brown, 6 B. M., 553; Lightburn v. Cooper, 1 Dana, 275; Marksbury v. Taylor, 10 Bush, 520; Campbell v. Hillman, 15 B. M., 518; Phelps v. Quinn, 1 Bush, 378; English v. Thomasson, 82 Ky., 280; Prewitt v. Trimble, 13 Ky. Law Rep., 581; Neel v. Neel, 16 Ky. Law Rep., 195; Ruffner v. Ridley, 81 Ky., 166; Wood v. Wood, 78 Ky., 628; Fisher v. May, 2 Bibb., 450; Waters v. Mattingly, 1 Bibb., 245; Jasper v. Hamilton, 3 Dana, 280; Peak v. Gore, 15 Ky. Law Rep., 279; Brannin & Co. v. Loving, &c., 6 Ky. Law Rep., 331; Trimble v. Reid, 17 Ky. Law Rep., 494; Same v. Ward, 17 Ky. Law Rep., 509; Banque Franco Egyptienne v. Brown, 34 Fed. Rep., 190;

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Livermore v. Middlesborough Town Lands Co.

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Ewing v. White, 69 Fed. Rep., 451; Slaughter v. Gerson, 13 Wall, 235; Company v. Newland, 39 Pac. Rep., 36.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

The appellee, the Middlesborough Town Lands Company, a Kentucky corporation, brought suit against appellant, averring that on the 17th day of October, 1889, the Middlesborough Town Company sold Livermore five lots in the city of Middlesborough, for the deferred payments upon each of which Livermore executed three notes, due one, two and three years after date. The note due one year after date had been paid, and judgment was prayed for the amount of the notes due at two and three years, and for the enforcement of the vendor's lien retained in the deed, those notes having been, for value, assigned to appellee. To this petition Livermore filed an answer and counter-claim, alleging that the town company was formed for the purpose of engaging in speculation and "booming" Yellow Creek Valley, under the name of the city of Middlesborough; that it acquired about 5,000 acres of land in the vicinity of Yellow Creek Valley solely for the purpose of speculation; that it was unimproved and miles from any other town, and that, upon acquiring it, the company laid off a large part of it in blocks, town lots, streets, alleys and parks; that the territory laid out had sufficient area to erect a large city; that the company had charts and maps printed, showing spaces set apart for various large manufacturing establishments, iron furnaces, spoke factories, etc., and laid off dummy lines and street railways, and did various other things to induce the belief by the public that a large and prosperous city would soon be built; that thereupon the company fraudulently gave out to the public that it could and would *fulfill its promise*, commenced the construction of a street-

car line, long since abandoned, and which it has wholly failed to construct or operate; that it has partly constructed a dummy line; that only a few of the industries marked off on the charts have ever existed, except in imagination; that there has been partly constructed by others than the company, but never operated, one furnace and one steel plant; that it staked off and showed the public where it intended to build or procure the building of a large charcoal furnace, and procured the foundation to be laid, all of which was done for the fraudulent purpose of deceiving the public; that such maps were circulated in large numbers in this and other countries; and that the company, by its officers and agents, represented to the public, of which defendant was a part, and to defendant, and by printed prospectuses spread broadcast to the public, that many vast enterprises had been established, and secured to be established, in the city of Middlesborough, to-wit, the Middlesborough Building & Investment Company, with a capital of \$100,000, and fifteen other named enterprises, the capital of each being stated in the petition; that defendant was lured to the town of Middlesborough, and to purchase the property for which the notes sued on were given, by those advertisements and representations, and then induced to buy the property set up in the plaintiff's petition;" that he had now ascertained, and the information was then known by the company, that no such institutions as ten of the institutions theretofore named in the answer, with any capital, had been procured to locate at Middlesborough; that three of the named institutions had a much less capital stock than had been represented, and that the representations in regard to each of said institutions were made with intent to defraud and deceive the public and the defendant; that one of the named institu-

tions, the Cumberland Gap Charcoal Furnace, was commenced to be constructed for the fraudulent purpose of deceiving and luring the public into the belief that the company would comply with its representations, but that, soon after the defendant and others bought property, the work thereon ceased, and nothing further has been done towards its completion; that, prior to his purchase, the company, by its authorized agents, represented that the iron and steel works would be immediately constructed and pushed to completion as rapidly as could be done, and would give employment to about 7,000 men, but that none of such iron and steel works have been constructed or operated; that the company represented that the industries already secured to be located in Middlesborough would employ at least 12,000 men, and he relied upon these representations and statements, which were fraudulent; that none of the enterprises had been established, and that, by reason of such failure, the property is almost worthless, and not worth more than one-fifth of the amount sued for; that if the representations had been true, Middlesborough would now be a city of 40,000 or 50,000 inhabitants, and the property purchased worth much more than was agreed to be paid; that the appellee is the successor of the town company, being the same company re-organized in a different name; and that it took the notes with knowledge of, and subject to, all existing defenses. He prayed that the notes should be canceled.

In a second paragraph, reiterating the averments of the first paragraph, and averring that the matters and things set out in the first paragraph were to have been done in a reasonable time, which had expired, he prayed that the deeds to him be set aside, and that he recover \$1,237.50, with interest, averring that he was an unmarried

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Livermore v. Middlesborough Town Lands Co.

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man, was such at the date of the execution of the deeds, and ever since, and that "he here tenders back to plaintiff any title or right to said lots he may have received by said deeds executed to him." He further averred that by reason of the failure of the town company to perform its agreements, and by reason of the false and fraudulent representations, he had been damaged in the sum of \$1,237.50, with interest, and prayed judgment therefor.

In the reply, all the affirmative averments of the answer were denied as to the representations and the failure to fulfill them; and it was pleaded affirmatively that a number of the enterprises mentioned had been established. The company further pleaded that it, in good faith, undertook to build up the city and to establish many large industries there, and did establish and cause to be established many such industries; that it attempted to establish many which had failed, and many which were established had, by reason of failure in business, ceased to exist; that, in doing this, it had expended great sums of money in good faith, to build up the city, and for no other purpose, and that the failure of any enterprise was without any fault on its part, or that of its predecessor; that if any of the representations set forth as having been made by it were actually made, which it denied, or any of them were false or fraudulent, the defendant, for a long time prior to the filing of this suit and of his answer, had full knowledge of all the facts in regard thereto, and knew whether they were false or not, and, with full knowledge of the truth, made payments on the purchase; and this knowledge and laches upon appellant's part was pleaded as an estoppel of his right to claim anything by reason of the alleged representations.

No rejoinder was filed to its reply.



Appellee, before filing its reply, demurred to the answer and counterclaim, and also moved the court to require appellant to elect which cause of action he would prosecute by his counter-claim, whether for the rescission of contract or for damages. The court overruled both demurrer and motion.

Upon final hearing, the court dismissed appellant's counter-claim, and gave judgment for appellee for the amount of its notes and for the enforcement of its lien.

In the view we have taken of this case, it is unnecessary to consider the demurrer or the plea of estoppel.

As was to be expected, the evidence is conflicting, and much irrelevant testimony has been introduced. The contract was made in October, 1889, and the evidence taken between four and five years thereafter. Testimony taken after such lapse of time is, in the nature of things, uncertain and unreliable; and especially is this true of testimony taken as to conversations and oral statements. General statements of belief, and of want of what is expected, under the influence of interest and desire, become distorted in the memory, and assume the proportions of definite statements of fact, or of solemn obligations to perform. On the other hand, such statements fade from the recollection of the persons making them, till not a trace remains. We can attach no very great degree of importance to such testimony, especially when, as in this case, the plaintiff claims to have relied on each and all of more than sixty-six representations which he avers were made, and were the inducements which led him to make his purchase, and but for which he claims he would not have made the investment.

A great number of circulars, prospectuses, newspapers and maps were filed with the depositions. All except

... them were issued subsequently to the date of the ... and, if admissible, at all, are certainly not admissible as showing representations which induced appellant ...

A careful examination of the conflicting testimony has led us to the conclusion that the weight of the testimony as to the oral statements is in favor of the theory that those statements were statements of what was hoped for and expected, and that some of the conversations which are claimed to have taken place with officers of the company were mere casual statements of what the company was going to do, made, not as agreements, but as statements of the expectation of the company. And taking Exhibit A—which is probably the strongest documentary testimony relied on by appellant—which is a prospectus purporting to be issued, not for the Middlesborough Town Company, the predecessor of appellee, but on behalf of the American Association, Limited, and various enterprises which had been inaugurated by it at Cumberland Gap and in the vicinity, including the railroads which had reached that locality, we find nothing on page fifteen, where the sixty-six enterprises whose failure is complained of in the answer are set forth, which can be construed as a statement that any of them were established, or to be established, in the town of Middlesborough.

Upon the other hand, if ever good faith was shown in the organization and management of what is called a "boom town," it has been shown in this case. It appears that the American Association, Limited, an English company, acquired about one hundred thousand acres of land at Cumberland Gap, and in the vicinity, which included a portion of the Yellow Creek Valley. The intention and object was to build up a great iron-producing industry in that

region, the promoters of the project believing, from examinations which had been made by expert geologists, that an unlimited supply of fine coking coal and superior iron ore was accessible in the immediate vicinity. Other valuable minerals were supposed to be obtainable in that region, and it was expected to develop their production; but the central idea of the project was the iron industry. The association induced the Louisville & Nashville Railroad Company to build a line to Middlesborough, and its promoters organized the Knoxville, Cumberland Gap & Louisville Railroad Company, tunneled Cumberland Gap, and built a railroad to Knoxville, besides securing a connection with the Norfolk & Western. The Middlesborough Town Company was then organized for the purpose of building a city in the Yellow Creek Valley, and purchased from the American Association and other parties over five thousand acres of land in that valley, which was laid out in lots and streets, and maps thereof published.

The town company organized other companies for street and freight railroads, an electric light company, a water company, a hotel company, and various others. Millions of dollars furnished by the stockholders of the town company and of the companies organized and promoted by it were expended. The primary cause of the enterprise was the supposed existence of vast deposits of coal and iron ore in the vicinity, and the controlling motive the establishment of a great iron and steel center.

Before the sales of October, 1889, appellant visited the place, made inquiries, and undertook to investigate the chances of profitable investment. In October a public sale of lots in the town was had. At that time a few of the companies organized and promoted by the town company were at work; the dummy line and the electric light com-

pany were in operation; and furrows had been run and signs put up to indicate where some of the principal streets were to be. There was no town—nor anything in the semblance of a town. It was a typical “boom town.” As a matter of course, speculators who purchased lots made reckless statements, in order to sell them at an advanced price. But the result was that by reason of the influx of speculators, and of men who intended in good faith to engage in the various enterprises expected to be established, an actual town was created.

In 1891 occurred the failure of Baring Brothers. There was an unprecedented constriction of the money market in England, and the Bank of England was compelled to ask assistance from the Bank of France. Notwithstanding the financial collapse in England, the English shareholders of the company agreed to take stock in a new company, put into it \$600,000, took over the property of the old company, and assumed its liabilities. The new company continued the work of building a city in the Yellow Creek valley—so far as we are able to ascertain from this record—with the utmost good faith. The “boom,” however, had collapsed. Purchasers of lots were unable or refused to pay their notes, and, some two years after the failure of the Barings, the panic of 1893 occurred in this country. The shareholders thereupon organized a third company,—the appellee in this case,—took in the stock of the second company, and paid into the new company \$350,000 more to pay off the indebtedness of the former companies.

The enterprise is still being prosecuted. The record discloses the fact that at the date of the submission of this case, preparations had been made and plants established for several large industries, which were

at that time waiting for a favorable season to commence business. As a matter of course, the projectors of many of the enterprises expected to be instituted were frightened away by the panic, and many others failed by reason of it. The appellant was in the town during the sales of October, 1889, and for a considerable time thereafter was a director and promoter in a number of the enterprises of whose failure he complains in this suit, notably the cemetery company; bought other lots and sold them; obtained, by reason of his connection with the company, inside information, and made money upon all the lots which he sold. It is not necessary here to consider the question whether *all* the lots which he purchased from the town company were but items of one transaction, and whether, if he made a profit upon the whole transaction, he can be heard to complain that he lost upon any of the individual items.

But appellant complains that the company has not accomplished everything which its officers stated was expected to be accomplished, and that third persons have not made the improvements and established the industries which the officers of the company represented they would establish. Without stopping to consider how far appellant is concluded by the actual investigation which he himself made, and the opportunities for such investigation which the record shows he enjoyed to an unusual degree, we shall proceed to consider the legal questions raised upon the main issue. What, under the law of this State, is a fraudulent representation which will entitle a party to a rescission of a contract?

Appellant claims that matters of opinion may amount to an affirmation of fact, and be an inducement to a contracting party, especially where the parties

are not on equal terms, and one of them is presumed to have means of information not equally open to the other, and that representations as to matters to be performed in the future, whether by the party making the representations or by third persons, may form the basis of a suit for rescission. He further contends for the distinction between the rule at law and in equity laid down in *Cooley on Torts* (page 497), where it is said: "It is often said, that, in order to render false representations fraudulent in law, it must be made to appear that the party making them at the time knew they were untrue. But this rule has so many exceptions that it is difficult to affirm with any confidence that it is a general rule at all. It is certain that courts of equity do not limit their action to it in giving relief, when representations prove it to be untrue in fact.

And in *Bigelow on Frauds* (volume 1, p. 410), the rule at law is thus stated: "One who brings about a sale or a contract by misrepresentation commits no fraud, if his representation was, when made, innocent in the ordinary sense of being free from moral wrong; i. e., if it was honestly believed to be true under circumstances permitting honest belief. Hence no action for damages can be brought, however grievously the party dealt with may have suffered."

And on page 412 the rule in equity is thus stated: "The 'fraud' upon which a proceeding to effect rescission is based is found in the purpose, or it may be the actual attempt, to enforce the contract after knowledge of the falsity of the party's representations has been brought home to him. Knowledge, at the time the representations were made, that they were false, only makes a stronger case. It is not essential. We speak of the rule as a rule

of equity. In courts of common law the rule stated has not prevailed."

Again, on page 413, Mr. Bigelow refers to the case of *Kennedy v. Panama Mail Co.*, Law Rep., 2 Q. B., 580, in which Lord Blackburn stated the distinction with great clearness. Illustrating the rule at law, Lord Blackburn said: "For example, where a horse is bought under belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought they were dealing about a sound horse, and were in error, yet the purchaser must pay the whole price, unless there was a warranty."

This distinction is also recognized by Story and Pomeroy, and is undoubtedly a well-recognized distinction in England, and in the greater number of the States of this Nation. But it has not been recognized in this State, except in a case which was overruled. Moreover, this court has not gone to the full extent of the rule as laid down in Pomeroy and Bigelow, but has held, in substance, that a party must, by the contract, protect himself against the falsity of the representations made to him, except when such representations were actually fraudulent; that is, false, and known to be false, by the party making them, or made under circumstances which did not permit honest belief in their truth.

In the case of *Waters vs. Mattingly*, 1 Bibb, 244, [4 Am. Dec., 631], a suit in equity for the rescission of a contract for the sale of a horse, it was held immaterial whether the party making the representation of soundness

knew it to be false or not. If it was in fact false, equity would relieve.

But in *Lightburn v. Cooper*, 1 Dana, 273, the court, through Chief Justice Robertson, said: "If the seller knew that the clock was not a good timepiece, his false representation was fraudulent, and then the tender of the clock would have operated as a rescission of the contract; but without such knowledge, actual or presumed, the simple fact that his representation was untrue would not affect the legal obligation of the contract."

In *Jasper v. Hamilton*, 3 Dana, 283, a suit for the rescission of a contract of sale of land, the court, through Judge Ewing, said: "In none of the bills is it alleged specifically that the defendant knew of the confliction with Welch's claim, and fraudulently concealed it from the complainant. . . . To constitute fraud, the vendor must *know* the fact which he represents to be different from his representation; or, knowing the fact to exist, fraudulently conceals it from the vendee."

There was, however, another question in that case, upon which also the court based its decision, viz., that the contract was a chancing bargain.

In the case of *Stewart v. Dougherty*, 3 Dana, 479, "Dougherty, apprehending that he had been defrauded by Stewart in a 'horse swap,' tendered to him the horse he had gotten from him, and thereupon sued him for the conversion of that which had been given in exchange." Chief Justice Robertson, delivering the opinion of the court, said: "The old case of *Waters v. Mattingly* which seems to have been relied on by the circuit judge as conclusive authority, is inconsistent with the well-established doctrine of the law, and has been repeatedly disregarded and overruled by this court.



"The true doctrine is that an innocent misrepresentation, not being fraudulent, furnishes no cause of action, nor any sufficient ground for rescinding a contract. Unless the party who makes the representation knows when he makes it that it is false, he is not deemed guilty of fraud, however erroneous or untrue it may happen to be."

In *Ball v. Lively*, 4 Dana, 370, a common law action, the court, through Judge Ewing, said: "Fraud consists in a willful misrepresentation of facts, or in a fraudulent concealment of them with a view to deceive. If a party honestly believe the representations which he makes to be true, he is guilty of no moral turpitude or legal responsibility for making them. . . . To be guarded against injury, each of the contracting parties should inform himself of the true state of the facts, or exact a warranty from the other for his indemnity, knowing, as he should be taught by the law, that he has no redress over or discharge from his contract, unless he has been deceived into it by the willful misrepresentations or fraudulent concealment of material facts by the other contracting party."

In *Buford v. Brown*, 6 B. Mon., 553, a bill in equity for the relief against judgments upon notes given for blooded fillies, in the sale of which vendees claimed to have been defrauded by misrepresentation in regard to the pedigree of the fillies, the court, after discussing the alleged misrepresentation, said: "The material point in determining the question of fraud is the known falsity of the affirmation when made," and denied the relief sought.

In *Campbell v. Hillman*, 15 B. Mon., 517, [61 Am. Dec., 195], action at law for fraud, the court, through Judge Simpson, said: "To constitute fraud, however, it is not only necessary that the representation should be untrue,

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Livermore v. Middlesborough Town Lands Co.

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but also that the party making it should know it to be so at the time it was made."

In *Phelps v. Quinn*, 1 Bush, 376, a suit for rescission of a contract of sale of mules which were visibly lame, the doctrine stated in the former cases is recognized, but is modified as follows, Judge Hardin delivering the opinion: "But while this general principle need not be controverted, it does not extend so far as to protect a party from the consequence of his false representations in regard to visible defects in property, when, assuming to know the nature and extent of such defects, he deceives or misleads another by a false explanation, however ignorant he may be of the real condition of the property."

*Robertson v. Clarkson*, 9 B. Mon., 506, is referred to in support of this case, but is not altogether in point, as the representations in that case were absolutely false, and so known to be by the vendor.

*Wood v. Wood*, 78 Ky., 629, and *Ruffner v. Ridley*, 81 Ky., 166, were suits for damages for fraudulent concealment, and therefore bear little application to the case at bar. In the former of these cases, both of which were decided by Judge Hines, the court said: "It is not the truth or falsity of the representation that constitutes the fraud. It is the concealed motive in the breast of appellant, and which prompted him to make the representation."

*English v. Thomasson*, 82 Ky., 280, was a suit upon lien notes, to which a counter-claim was pleaded, praying a rescission of the contract of purchase on the ground of fraudulent misrepresentations as to title. Having assumed that the title was defective, Judge Holt, delivering the opinion of the court, said: "Admitting for argument's sake that it was so, yet the defendant is not entitled to

the relief asked by him upon the mere ground that this was so, and that the appellee represented differently. It is insisted by the counsel for the appellant that this is an unsettled question in this State, and that the general rule elsewhere is that the falsity of the representation is sufficient, though innocently made. A careful review, however, of the authorities has satisfied us that in this State the question is not an open or doubtful one."

The court cited the case of Buford's Adm'r v. Guthrie, 14 Bush, 690, in which it was said by Judge Cofer, delivering the opinion of the court: "Where contracts have been fully executed, there can be no rescission, unless there has been actual fraud; and an innocent misrepresentation as to the state of the title is not such fraud as will warrant a rescission."

After quoting from Justice Story (1 Story, Eq. Jur., section 193), as follows: "Whether the party thus representing a material fact knew it to be false, or made the assertion without knowing whether it be true or false, is wholly immaterial," . . . Judge Holt said: "The distinguished author doubtless did not intend to, nor does his statement, in our opinion, apply to a case of innocent misrepresentation by a party as to the state of his title where the vendor is not insolvent or a non-resident, and the vendee is in quiet possession, and has chosen to provide for his protection by a warranty of the title; and, in the light of the numerous decisions cited, we could not so hold, even if supported by such eminent authority."

In Peak v. Gore, 94 Ky., 534, [23 S. W., 356], appellee, by false representations that a hotel was worth \$10,000, that he had been offered that sum for it, and that its earning capacity was from \$25 to \$50 per day, induced appellants, who were persons without practical knowledge or

experience of the value or management of hotel property, to purchase it for that sum, when, in point of fact, it was hardly worth \$5,000. Suit was brought for rescission of the contract, and this court, through Judge Lewis, said, after reciting the facts: "But as they purchased after having time and opportunity to ascertain for themselves, value of the property, and did in fact examine it, commendation or even false representation of its value by Gore can not, according to settled rule, afford ground for rescission."

In *Neel v. Neel*, 16 Ky. Law Rep., 195[26 S. W., 805], Judge Hazelrigg thus stated the distinction between the rules applicable to specific performance, and to rescission of executed contracts: "The ground upon which courts of equity proceed in rescinding or canceling executed contracts 'is more narrow, and to be more carefully trodden, than that upon which they refuse specific performance, or even decree executory contracts to cancellation. Nothing but fraud or palpable mistake is ground for rescinding an executed contract, (*Graham v. Pancoast*, 30 Pa. St., 89; *Nace v. Boyer*, Id., 109.)"

That the same rule of evidence prevails in equity as at law is emphatically stated in the case of *Marksbury, &c., v. Taylor, &c.*, 10 Bush, 523. Section 190 of *Story's Equity Jurisprudence* had been quoted, discussing the remark of Lord Hardwicke that, in equity, "fraud may be presumed from the circumstances and condition of the parties contracting; and this goes further than the rule of law, which is, that fraud must be proved, not presumed." Said Judge Cofer, delivering the opinion: "We can not subscribe to the doctrine attempted to be deduced from the foregoing quotation, to the effect that the chancellor may find fraud as a fact on less evidence or on evidence differ-

ent from what would be required to authorize a jury to find the same fact. That which will satisfy the mind of one may not satisfy the mind of another; but the true rule in all courts, without regard to their character, must be to require such legal evidence as will overcome, in the mind of the tribunal, the legal presumption of innocence, and beget a belief of the truth of the allegation of fraud. Any other rule would be calculated to create invidious distinctions between the different courts of the country, and would make the rights of parties depending upon questions of fraud or no fraud to turn upon the accident which brought them into the particular forum, and not upon uniform and known rules of law. . . . The chancellor, like a jury, must have such evidence as satisfies the mind to a reasonable degree that fraud has been committed before he is justified in finding its existence."

In *Prewitt v. Trimble*, 92 Ky., 177, [36 Am. St. Rep., 586; 17 S. W., 356], appellee (president of a bank) and the board of directors caused to be published a statement of the resources and liabilities of the bank, signed by the cashier. The president sold stock in the bank on the strength of that statement, the meaning of which was explained by him at the time of the contract, which statement proved in a short time to be a gross misrepresentation of the condition of the bank. It was held that "the cashier's statement was published and circulated by authority of the president and directors for the purpose and in expectation of its being accepted and treated by the public as in all respects true and reliable, thereby not only increasing business of the bank, but keeping up or enhancing market value of the stock, in which of them had a personal interest." Said the court, through Judge Lewis:

"Representations by a party having means of knowledge in regard to a matter not possessed generally are apt to be believed and acted upon, especially if he is in a situation where he owes a duty to the public to deal honestly and intelligently. Therefore, something more than use of ordinary diligence to know the condition of a bank should be required of the president in order to exempt him from liability to a person who has suffered loss by a false statement or report of its affairs officially made or affirmed by him, especially when he has been thereby personally benefited."

In this case the doctrine of responsibility for false representation was carried further than it had ever been carried in this State, for in the argument of the opinion it was stated that relief might be had in damages, or by equitable proceedings, for a false representation, when made: "First, without actual knowledge of either its truth or falsity, as when the party has affirmed his knowledge by a positive statement which implies knowledge; second, when made under circumstances in which the party ought to have known, if he did not know, of its falsity; as when, having 'special means of knowledge,' it is his duty to know."

A rescission of the contract of sale of the bank stock was granted, the court citing with approval section 145 of Cook on Stock and Stockholders as to statements by authorized agents of a corporation in regard to the status of the corporation, whereby subscriptions are obtained, but calling special attention to the rule there laid down that "in all these cases a distinction between statements relative to the prospects and capabilities of the enterprise, and statements specially specifying what does or does not exist, must be carefully borne in mind."

In *First National Bank of Stanford v. Mattingly*, 92 Ky., 657, [18 S. W., 940], the opinion in which was also delivered by Judge Lewis, a distinction between the position of a purchaser and that of a surety of a purchaser was stated. Said the court: "The well-settled rule is, as argued, that mere commendation, or even false representation, by the seller of property as to its value, when the purchaser has an opportunity to ascertain for himself such value by ordinary vigilance or inquiry, has no effect on the legal rights of the contracting parties, even when made with intention to deceive. *Marshall v. Peck*, Dana, 609. But that rule does not apply to conduct of a seller to the surety of the purchaser," etc.

In *Clark v. Tanner*, 100 Ky., 278, [38 S. W., 11], the case was decided on the ground that the notes sued on had been placed on the footing of inland bills of exchange, transferred before maturity without notice of the alleged fraud, and therefore held by the purchaser unaffected by the fraud of the original payee, even if of such character as to have avoided the contract between the original parties. But, in discussing the plea of fraud, the court, through Judge Lewis, stated the following dictum: "While it is not difficult to conceive a case where the vendor may make false representations of his intention and purpose, or intention and purpose of persons associated with him amounting to an implied undertaking to make, or cause made, improvements of such a character and extent as to greatly increase market value of real property in a mushroom town, and thus fraudulently induce a stranger to purchase property he has to sell, at extravagant or boom price, the purchaser himself is not wholly relieved of the duty of exercising reasonable diligence; for what is merely commendation of quality or value, present

or prospective, of his property that any vendor may legally make, should not be mistaken for false representations by the seller in respect to what is latent and not discernible by proper diligence of the purchaser."

The dictum expressed in the first sentence of the quotation, *supra*, if followed by the court, would be a clear departure from the doctrine laid down in numerous adjudicated cases in this Commonwealth, and from the doctrine specially insisted upon in the opinion by the same learned judge in *Prewitt v. Trimble*, *supra*.

The doctrine to be deduced from the Kentucky cases has been admirably stated by Judge Taft in *White v. Ewing*, 16 C. C. A., 296, 69 Fed., 451: "There remains now to be considered only the question raised upon the merits. Many of the defendants filed answers, and made defense. The only defense really pleaded in the answers was that the purchase of the lots and the execution of the notes had been induced by false representations made on behalf of the company. The evidence introduced to make this defense was very unsatisfactory, and entirely inadequate to sustain it. The prospectus of the company was wholly promissory, and did not state falsely any existing fact. Other statements contained in the daily press in regard to the company, its condition, capital and prospects are not traced to the agents of the company. Slight as the evidence is, it shows clearly enough that no one made any money out of the enterprise, but that the projectors, as well as the lot-owners, were all disappointed in their expectations. It was an enterprise made possible by the speculative fever so widespread at the time. Its disastrous failure was quite like that of a hundred others of like character, and is not evidence *per se* of a conspiracy to defraud on the part of the promoters, but only



of a buoyant self-deception in respect to the material possibilities, and an unreasonable blindness to material difficulties. All who took part in the scheme knew its speculative character, and can not escape liability on the obligations they assumed, unless they can put their fingers on false statements of material and existing facts which induced them to make the venture. This they have utterly failed to do."

To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was of a matter of material fact (as distinguished from opinion), at the time of previously existing (and not a mere promise for the future); must be relied upon by the person whose action is intended to be influenced; and must be made with knowledge of its falsity, or under circumstances which did not justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions. There are some modifications of this doctrine, but they are chiefly by way of substitution of an equivalent for some one of the essentials necessary to constitute fraudulent misrepresentation; as in the cases where it is held that a fraudulent concealment of a material matter of fact is the equivalent of an actual misrepresentation, and the cases in which a statement made as of personal knowledge, but without knowledge, was held to be equivalent to a statement whose falsity was known.

When tested by the Kentucky decisions, a case of fraud for which equity will relieve has not been made out. The enterprise, if disastrous to the purchasers of lots, was even more so, as shown by this record, to the projectors. In the nature of things, all who purchased at the sale in

October, 1889, were bound to know that the enterprise was speculative in its character. No sane man could look over that barren valley without knowing that the success of the projected city was dependent upon the countless vicissitudes of the future, and that he took long chances in buying lots in that as yet imaginary town. Men capable of consecutive thought must have known that in such a town prices per front foot which would have been high for property in the metropolis of the State, could not long endure; and, therefore, the conclusion is almost irresistible that such purchases were made in the hope of quick and large profits.

If that be the case here—and there is some evidence in appellant's letters to sustain that theory—if he miscalculated the strength and enduring vigor of the "boom" at Middlesborough, and made his purchases hoping for gain, and taking his chance of loss, then this case would come within the rule laid down in 2 Pom. Eq. Jur., section 815, as to chancing bargains. But it is not necessary to consider that view of the question. It is sufficient to say that a case of fraudulent misrepresentation has not been made out, under the law as administered in Kentucky. For the reasons given, the judgment is affirmed.

The whole court sitting, Hazelrigg, C. J., and Guffy, J., dissenting.

Burnam, J., concurs in the conclusion reached, but dissents from the argument.

## The Louisville Tobacco Warehouse Co. v. Commonwealth.

## CASE 14—INDICTMENT FOR MISDEMEANOR—MARCH 14.

## The Louisville Tobacco Warehouse Co. v. Commonwealth.

## APPEAL FROM FRANKLIN CIRCUIT COURT.

(The opinion in this case was delivered in response to a petition for a rehearing.)

**CORPORATIONS—REPORT FOR FRANCHISE TAXES.**—A private trading corporation not "having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service" is not required to make a report to the Auditor as a basis for the ascertainment of, and tax upon, its franchise.

**HUMPHREY & DAVIE FOR THE APPELLANT. (D. W. LINDSEY OF COUNSEL.)**

1. The franchise tax statute (Ky. Stats., sec. 4077) does not embrace ordinary private business concerns incorporated. *Gordon v. Winchester Bldg. Assn.*, 12 Bush, 114; *Com. v. Whipps*, 80 Ky., 282; *Williams v. Cammack*, 61 Am. Dec., 513; *Bouvier's Law Dictionary*, title "Exclusive"; 26 Am. & Eng. Ency. of Law, 233; *Thompson on Corps.*, sec. 2925 and note; *Barbour v. City of Louisville*, 83 Ky., 102; *Harrison v. Com.*, 83 Ky., 162; *Black on Interpretation of Statutes*, p. 161; *The Abbot's case*, 98 U. S., 444; *Barbour v. Board of Trade*, 82 Ky., 653; *Lancaster v. Clayton*, 86 Ky., 373; *Clark v. Louisville Water Co.*, 90 Ky., 515; *Com. v. Makibben*, 90 Ky., 384; *McDonald v. Hobby*, 110 U. S., 628; *Nash v. Page*, 80 Ky., 539; *Franke v. Paducah Water Co.*, 88 Ky., 467; 29 Enc. of Law, p. 19; *Western Union Telegraph Co. v. Norman*, 77 Fed. Rep., 27.

(Upon this point counsel referred to brief on file in the case of *Louisville & Jeffersonville Ferry Co. v. Com.*, 104 Ky., 726.)

2. The court below erred in holding the statute to mean that this company, if covered by the statute at all, was not entitled to receive any notice from the Auditor as to what form of tax blank the Auditor had prepared or adopted for the current year, and in

106	165
105	475
105	477

106	165
106	530

106	165
115	799

106	165
119	79

106	165
121	262
121	888

123	84
123	87

123	201
124	539

106	165
129	743

106	165
129	112
135	329

106	165
132	365

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The Louisville Tobacco Warehouse Co. v. Commonwealth.

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holding that this company was not entitled to have tax blanks furnished for it to file; and in holding that this company was not entitled to be first called on to make its returns before it could be considered as in criminal default and be fined.

(Counsel made additional points identical with those made in the case of Louisville & Jeffersonville Ferry Co. v. Com., 104 Ky., 726, and numbered in the report of that case from two to nine inclusive, with the same citations as there given.)

W. S. TAYLOR, ATTORNEY-GENERAL, FOR THE APPELLEE.

(Brief not in the record.)

ROBT. B. FRANKLIN, COMMONWEALTH'S ATTORNEY, ON THE SAME SIDE.

(Brief not in the record.)

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

Most of the questions presented by the briefs in this case have been settled by the opinion recently delivered at this term in the case of Louisville & Jeffersonville Ferry Co. v. Com., 104 Ky., 726; [47 S. W., 877]. The sole question remaining for decision is whether a private trading corporation is required to make report to the auditor, as basis for the ascertainment of a tax upon its franchise.

The statute (Ky. St., section 4077) provides: "Every railway company or corporation and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by

law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised," etc.

By the next section it is provided: "In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies and associations mentioned in the next preceding section, except banks and trust companies, whose statements shall be filed as hereinafter required by section 4092 of this article, shall annually, between the fifteenth day of September and first day of October, make and deliver to the auditor of public accounts of this State a statement verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing the following facts," etc.

By section 4078 it is provided that the Auditor, Secretary of State and Treasurer constituting the Board of Valuation, shall, "from the said statement of the corporation, and from such other evidence as it may have, fix the value of the capital stock of the corporation; and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in the State, or in the county where situated; and the remainder thus found shall be the value of the corporate franchise subject to taxation by the Board."

From these provisions it is manifest that the so-called franchise tax is in reality a property tax upon all the intangible property of the corporations named in the act.

And so, in *Henderson Bridge Co. v. Kentucky*, 166 U. S., 154, [17 Sup. Ct., 534], the Supreme Court, in considering

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The Louisville Tobacco Warehouse Co. v. Commonwealth.

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this statute, said: "The tax in controversy was nothing more than a tax on intangible property of the company in Kentucky, and was sustained as such by the Court of Appeals."

And in *Adams Express Co. v. Kentucky*, 166 U. S., 180; [17 Sup. Ct., 530], the Supreme Court said: "We agree with the circuit court that it is evident that the word 'franchise' was not employed in a technical sense; and the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies, possessing no franchise, should be valued at its entirety, the value of the tangible property be deducted, and the value of the intangible property be thus ascertained and taxed for these purposes."

And so this court, in *Henderson Bridge Co. v. Com.*, 99 Ky., 639, [31 S. W., 486], held that the term "intangible property" was used as synonymous with "franchises."

The sections we have referred to show conclusively that their object was to obtain a valuation of property for the purpose of taxation. The corporate property sought by this statute to be subjected to taxation may be said to be the added value which the exercise by the corporation of any special or exclusive privilege or franchise not allowed by law to natural persons gives to the tangible property. For example, a railroad track, without the right of operating a railroad, would be of small value; with that right, it might be worth millions of dollars.

So, in ascertaining what corporations come within the purview of this statute, and are by it required to make report to the Auditor, we should keep in mind the ultimate purpose of the statute, which is the taxation of this intangible property, and consider whether all corporations can, in

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The Louisville Tobacco Warehouse Co. v. Commonwealth.

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law, possess such intangible property; for surely we are not to stretch the language of the statute beyond its letter, and assume that the Legislature intended to require a vain thing, by imposing severe penalties for failure to report intangible property upon corporations which do not, and in law can not, possess it.

The appellant is an ordinary business corporation, created under the general law, under which no special or exclusive privilege not allowed by law to natural persons can be obtained. It conducts its business with the same rights and privileges, and subject to the same restrictions as natural persons engaged in the same business.

It is insisted, and appears to have been so decided by the trial court, that the insertion in the articles of incorporation of a proviso that the private property of stockholders should not be subject to the corporate debts, gave to the corporation an exclusive privilege, not enjoyed by natural persons, and therefore brought this corporation within the purview of the statute. This construction would bring every business corporation in the Commonwealth within the letter of the statute, and that is the contention made on behalf of appellee. But this privilege is a privilege, not of the corporation, but to the stockholder, and a privilege which every natural person may avail himself of by becoming a stockholder in a corporation.

The corporation itself is a distinct entity, making its own contracts, and responsible for its debts, to the uttermost farthing of its assets.

It is conceded that a trading corporation has a franchise; but its franchise is merely a franchise to exist, to have a name, to contract and be contracted with, to sue and be sued, in the same manner as a natural person, and this franchise is not a "special or exclusive privilege or fran-

chise not allowed by law to natural persons." Nor can the appellant corporation be said to have any intangible property subject to taxation under this statute. Its tangible property—its warehouse, drays and personal property—is of no greater value in the hands of the corporation than it would bear if owned and managed by the natural persons who are its stockholders. This is also true of its choses in action, etc. The value of its capital stock must necessarily be the value of its tangible property, choses in action, etc. It had no intangible property subject to taxation under the statute, and, as matter of law, could have none.

This brings us to consider the question whether private business corporations were intended by the Legislature to make the report provided for in the statute. The statute enumerates by name twenty different varieties of corporation and company, followed by the words, "and every other *like* company, corporation or association." It then provides, "also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service." It seems obvious that *some* varieties of corporations were intended to be excluded from the operation of this act; for why should this painstaking particularity of enumeration have been used, if the object was to include *all* incorporated companies, which would be the effect of the law if appellee's contention be sustained—that the exemption of private property from corporate debts is a privilege to the corporation? The latter clause, "also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service," seems to us to have been added for the purpose of includ-



ing such corporations as were not strictly *ejusdem generis* with the companies previously enumerated, but which might possess exclusive privileges, and, as a provision for the future, to impose the intangible property tax upon corporations to be hereafter created, which might have exclusive privileges or perform public services.

The only authority relied on in support of the contention that this language includes all corporations is the case of *Western Union Telegraph Co. v. Norman*, 77 Fed., 27. But that case was in relation to a company specifically named in the statute under consideration. The question here presented did not arise in that case, and was, presumably, not argued; and the suggestion made by the learned judge who delivered that opinion was made in argument, in reaching a conclusion to reach which the dictum cited was not necessary.

While we attach little importance to legislative debate or legislative action, in the amendment or alteration of bills while on their passage, as a means of ascertaining the proper construction of the act adopted, it is interesting to note that this bill, as originally introduced, provided for the taxation of "every corporation organized under the laws of this State, or any other State, for the purpose of profit or doing business, with the exception of certain enumerated foreign corporations.

It further appears, from an examination of sections 4227, 4228, 4231 and 4232, that section 4077 could not have been intended to apply to *all* corporations; for those sections provide for the taxation of foreign life insurance companies, foreign building and loan associations, foreign insurance companies other than life, and foreign assessment companies.

The conclusion reached is strengthened when we con-

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The Louisville Tobacco Warehouse Co. v. Commonwealth.

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sider the contemporaneous practical construction of the statute by the officers required by law to enforce it. *Barbour v. City of Louisville*, 83 Ky., 102; *Harrison v. Com.*, 83 Ky., 162.

It has been suggested that to hold that this statute does not apply to all corporations would render the act unconstitutional, as in violation of section 171, which requires the taxes to be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. But we can not concur in this contention. The revenue law of the State is not unconstitutional because it does not require natural persons, possessing no special franchise or privilege, to make report of special privileges and franchises for taxation; nor is it unconstitutional in failing to require a report for the purpose of a franchise or intangible property tax from those corporations, which have no special or exclusive franchise, and can not, as matter of law, possess intangible property. The law requires a report from all classes of corporations which can possess the intangible property sought to be taxed by this statute. The tax upon tangible property of all corporations is elsewhere provided for.

There remains but one question for consideration, and that is whether this company comes within the section, under the words "or performing any public service." It has been repeatedly held by this court, in passing upon exemptions from taxation, that the test to determine whether an institution performs a public service is whether there exists the right to levy a tax upon the public in aid of the institution. *Barbour v. Board of Trade*, 82 Ky., 653; *Lancaster v. Clayton*, 86 Ky., 373, [5 S. W., 864]; *Clark v. Louisville Water Co.*, 90 Ky., 515, [14 S. W., 502]; *Com. v. Makibben*, 90 Ky., 384, [29 Am. St. Rep., 382; 14 S. W., 372].

Nor do we think, under the case of *Nash v. Page*, 80 Ky., 539, [44 Am. St. Rep., 490], following the case of *Munn v. Illinois*, 94 U. S., 113, that property becomes clothed with a public interest when used in a manner to make it of public consequence, and to affect the community at large. "When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants the public an interest in that use and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

This is very far from holding that a tobacco warehouseman performs a public service. It was there held that an analogy existed between the business of a warehouseman and that of a common carrier, in this: That as the owner of a stage can not, without excuse, decline to take a passenger, so a warehouseman is bound to allow all tobacco buyers to bid for tobacco on reasonable terms at his warehouse, and can not evade this responsibility by calling himself a commission merchant while continuing the business of warehouseman. And it is manifest that the business of warehouseman is as much affected by the public interest when conducted by a natural person as by a corporation, and it is not contended that the law was intended to apply to tobacco warehouses operated by natural persons. For the reasons indicated, a rehearing is granted, the former opinion is withdrawn, the judgment reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

The whole court sitting. Judges Guffy, Paynter and White dissenting. Judge Hobson concurring.

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The Louisville Tobacco Warehouse Co. v. Commonwealth.

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In this case the whole court is agreed that the indictment against appellant should be dismissed, but it has become necessary for the guidance of the executive officers of the State that the court should construe section 4077 of the Kentucky Statutes, relating to tax on franchises. The proper construction of this statute presents a question of great difficulty, on which the members of the court have been unable to agree; and it must be determined, in order that persons interested may know how to conduct their business.

The statute reads as follows: "Every railway company or corporation and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association, having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised."

It is insisted that this statute applies to all corporations. It is said that the right of corporate existence is a franchise,, and that the exemption of the stockholders from liability for corporate debts is also a franchise, and so that all corporations are included in the section. There would be more force in this argument if the statute

read, *any franchise*, but it reads, "*any special or exclusive privilege of franchise not allowed by law to natural persons*;" and this special or exclusive franchise may be taxed in any county, city, town or taxing district where it *may be exercised*. The same Legislature that passed this act passed a statute allowing everybody to form corporations for certain business purposes, and the right of corporate existence enjoyed by these corporations is in no sense a special or exclusive franchise not allowed by law to natural persons.

In Morawetz on Private Corporations (section 923) the accurate author says: "All persons have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation and of acting in a corporate capacity under the general incorporation laws can be called a franchise only in the sense that the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise."

The same rule is laid down in Thompson on Corporations, section 5335. In section 5336 this author also says: "The franchise of being a corporation vests in the individuals who compose the corporation, while those secondary franchises, which we shall hereafter see, are vendible by the corporation, necessarily, and for that reason alone, must be deemed to vest in the corporation."

The right of corporate existence, not vesting in the corporation, does not pass under a sale by it of all its property and franchises. *Smith v. Gower*, 2 Duv., 19 *Thompson on Corporations*, section 5354; *Coe v. Columbus Railroad Co.*, 75 Am. Dec., 518; *Metz v. Buffalo Railroad Co.*, 17 Am. Rep., 201; *Fietsam v. Hay* (Ill. Sup.), [3 Am. St. R., 493; 13 N. E., 501].

That which does not pass under a grant of all the corporate property and franchises is certainly not a franchise of the corporation for taxing purposes, under our Constitution, providing for the taxation of all property of the citizen.

It is equally clear that the exemption of the individual property of the stockholders from corporate debts is not a franchise of the corporation, but vests in the stockholders. It is not a special or exclusive privilege not allowed by law to natural persons, for all persons may be stockholders in corporations. The privilege is open to all who may wish to take advantage of the statute. The concluding words of the sentence providing for the payment of a local tax on the franchise to the county, city, town and taxing district where it may be exercised, can not refer to the exemption of the individual property of the stockholder from corporate debts; for these words plainly refer to rights exercised by the corporation, such as the collection of tolls, the taking of private property under the right of eminent domain, and the like. If they refer to the exemption of the stockholder's individual property from corporate debts, then it would follow that a local tax under this statute could be imposed in every county or locality where it was exercised; that is, where any stockholder enjoyed the exemption, which might be in any part of the State.

The object of the statute is to get at the property of the corporation for the purposes of taxation. It refers, by the terms "privilege or franchise," to rights possessed by the corporation which are valuable as property, and so should be assessed for taxation. The right of the stockholder to exemption from liability for the debts of the corporation above the amount specified by law is

not the property of the corporation, and so should not be construed within a statute providing simply for the taxation of its property. The right to do business as a corporation is no more the property of the corporation than the right to do business as a partnership is the property of the firm. Limited partnerships are common, where the partners are not to be liable for the firm debts, and no one would contend that such a partnership falls within this statute.

The same result will be reached if we examine the other words of the section. It will be observed that it applies, not only to corporations, but to other companies or associations. Corporations and unincorporated associations are placed by the statute on the same plane. It applies to all, whether incorporated or not, "having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service." This is made very clear by section 4082 in the same subdivision, which is as follows: "Whenever any person or association of persons not being a corporation, nor having capital stock, shall, in this State, engage in the business of any of the corporations mentioned in the first section of this article, then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purpose of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation."

Section 4086 also provides: "All corporations and other persons who are required to make reports to the Auditor of Public Accounts shall pay all the taxes due the State

from them into the treasury at the same time, and shall be liable for and pay the same rate of interest and penalties as defaulting individuals, except where otherwise specially provided."

The three sections must be read together, as they form part of one plan. From the three, taken as a whole, it is evident that the purpose was to reach persons or corporations having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service. With this view, all persons engaged in the business of any of the corporations referred to are placed on exactly the same plane as the corporations, and such persons, as well as the corporations, are required to pay their taxes directly to the Auditor. If the first section includes all corporations, then it would follow that all individuals engaged in the same business as the corporations must be assessed in the same way. No one has ever so construed the statute. It would not be contended that any individual or association must pay taxes directly to the Auditor, unless exercising a special or exclusive privilege or franchise not allowed by law to other natural persons, or performing some public service. But if the statute does not apply to an individual, it does not apply to a corporation in the same business, for both understand it just alike. No corporation is included within the statute, unless an individual or an unincorporated company situated just as it is would be covered by it.

Section 4085 provides: "The property of all corporations, except where herein differently provided, shall be assessed in the name of the corporation in the same manner as that of a natural person."

These sections are a part of the general revenue and



taxation bill, providing for the payment of a uniform tax on "all property directed to be assessed for taxation" by the owner, person or corporation assessed. Ky. St., section 4019. Personal property of every kind is required to be separately valued, and, if there be no appropriate column in the tax book, it shall be valued in the column headed "*Miscellany*." Id., section 4050. When the assessor has taken the tax list of corporations like appellant, including their tangible and intangible property, all that they have has been given in for taxation, just as in the case of a firm or any other unincorporated association.

Section 4077 was not intended to apply to any of these, but only to such corporations or companies as exercised special and exclusive franchises, or performed some public service. The value of these intangible franchises could not well be fixed by an assessor, and, when these companies have paid a tax on these franchises, they have only been taxed on all their property as provided by the Constitution. The same result is reached when appellant gives in all its property to the assessor, and so all are put on the same footing.

The statute referred to received a legislative construction by the act approved March 19, 1898, entitled, "An act concerning the assessment and valuation for taxation of corporate franchises and intangible property by cities of the first and second class." This act follows nearly literally all the sections of the act before us, but provides (Acts 1898, p. 96): "No assessment for city taxes shall be made by any assessor or board of valuation and assessment of the franchise of any private business, mercantile or manufacturing corporation whose property is not devoted to a public use."

It can not be presumed that the legislature intended

one rule to apply in cities of the first and second classes, and a different one in the State at large and all of its other subdivisions. It had no power, under the Constitution, to exempt from taxation property in cities of the first and second classes that is subject to taxation in other parts of the State. If the act could be so construed, it is unconstitutional.

It is a well-settled rule that that construction must be adopted which will uphold both acts, rather than the one which will destroy one of them. Under this rule, the second act must be regarded as a legislative construction of the first, and that act must be construed as not applying to the classes of corporations exempted from the operation of the other act.

The statute was given this practical construction by the executive officers of the State during two administrations. The Legislature was well aware of the construction, so put upon it, and, having not only acquiesced in it, but expressly adopted it, it should not now be departed from.

Appellant is a private business corporation, organized under chapter 56 of the General Statutes, possessing no franchises or privileges not possessed, in effect, by an individual or limited partnerships engaged in the same business. Such corporations are now running stores, farms, mills and many other enterprises in this State. They are not within the letter or spirit of the statute, and no good can come from requiring them to make the reports in question.

For these reasons, I concur in the opinion of the court delivered by Judge DuRelle. This separate opinion is filed in addition only to state more in detail some of the reasons sustaining the conclusion reached.

## CASE 15—ACTION TO ENFORCE LIEN—MARCH 14.

## Ryan v. Middlesborough Town Lands Co.

## APPEAL FROM BELL CIRCUIT COURT.

## 1. PLEADING—ACTION TO FORECLOSE LIEN—DESCRIPTION OF PROPERTY.—

It is a sufficient description of property against which a lien is sought to be enforced to allege that it is "known and designated upon the map of town lots of the Middlesborough Town Co., recorded in the office of the clerk of the Bell County Court as lot No. 7 in block No. 407, section northeast."

## 2. SAME—ANSWER.—An answer which avers that the contract sued on and its sale to defendant were procured by fraud, covin and misrepresentation, is good without stating the facts constituting the fraud, covin or misrepresentation.

## 3. SAME—REPRESENTATIONS OF ANTICIPATED FACTS.—A fraudulent misrepresentation to warrant relief from a contract must be of an existing and not of an anticipated fact; and the answer in this case, fairly construed, sets out promises for the future.

## W. E. CABELL AND ISAAC T. WOODSON FOR APPELLANT.

1. As to insufficiency of description of property. *Ross v. Adams*, 13 Bush, 370; *Faught v. Henry*, 13 Bush, 471.
2. As to invalidity of proceedings against nonresident. *Brownfield v. Dyer*, 7 Bush, 505; *Max Meadows L. & I. Co. v. Brady*, Virginia Court of Appeals, Va. Law Reg., 1895.
3. As to the sufficiency of answer, set-off and counterclaim. *Wilson v. Carpenter*, 91 Va., 184; *Max Meadows L. & I. Co. v. Brady*; *Benjamin on Sales*, vol. 1, 643, 644, 645, 646, notes 11 and 12; *Herman on Estoppel*, vol. 2., par. 1169; par. 772, p. 898.

## SAMPSON &amp; CHAPMAN FOR THE APPELLEE.

1. The description of the land in the petition was good. It refers to the map of record.
2. Lloyd was not a necessary party to the action and no judgment was rendered in any way affecting him.
3. The second paragraph of the answer is not good. It attempts to plead a want of consideration for the execution of the notes

## Ryan v. Middlesborough Town Lands Co.

by Lloyd and the assumption of the same by Ryan, when at the same time it admits possession of the land for which the notes were executed.

4. The third and fourth paragraphs are not good because they fail to state wherein the fraud, covin and misrepresentations of the plaintiff consisted.
5. The fifth paragraph was not good; it did not state that the plaintiff had misrepresented a material existing fact. *Sawyer v. Prickett*, 19 Wall., 146; *First Natl. Bank of Stanford v. Mattingly*, 14 Ky. Law Rep., 69. Nor does this paragraph state anywhere that the alleged misrepresentations were made for the purpose of deceiving defendant or any one. Misrepresentations, unless they be of existing facts, are the mere expressions of opinion, of hope or expectation and can not be the basis of an allegation of fraud. *Wade v. Ringo*, 25 S. W. R., 901; *Gage v. Lewis*, 6 Ill., 604; *Ball v. Lively*, 4 Dana, 370; *Huls v. Black*, 14 Ky. Law Rep., 805; *Brandt. on Suretyship, &c.*, 404; *Fisher v. May*, 4 Bibb, 450.
6. The pleading is further defective in failing to show the defendant relied on the alleged misrepresentations as true, and that the Town Companies' agents knew them to be false. *Marksbury v. Taylor*, 10 Bush, 520; *Ball v. Lively*, *supra*; *Jasper v. Hamilton*, 3 Dana, 280; *Stewart v. Dougherty*, 3 Dana, 479; *Buford v. Brown*, 6 B. M., 553; *Campbell v. Hillman*, 15 B. M., 518; *English v. Thomasson*, 82 Ky., 280.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

The appellee brought suit against appellant and one B. L. Lloyd, alleging that its predecessor, the Middlesborough Town Company, had sold and conveyed to Lloyd a lot of land in Middlesborough, retaining a lien for the unpaid purchase money; that Lloyd, in part payment therefor, had executed three promissory notes, which were due and unpaid, and had been assigned to appellee for a valuable consideration; that Lloyd had sold the lot mentioned to the appellant, Ryan, by deed, which was acknowledged and delivered to and accepted by Ryan, and in which appellant, as a part of the purchase price, assumed and agreed to pay

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Ryan v. Middlesborough Town Lands Co.

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and satisfy all the lien notes, and that appellant was in possession of the land.

A demurrer to the petition was properly overruled, the sale by Lloyd to Ryan, and the assumption by the latter of the unpaid lien notes, being sufficiently averred, and the lot being sufficiently described as "known and designated upon the map of town lots of the Middlesborough Town Company, recorded in the office of the clerk of the Bell county court as lot No. 7 in block No. 407, section north-east."

Lloyd was made a party defendant by constructive process, but did not appear or plead.

Appellant Ryan filed an answer, set-off and counterclaim, to which a demurrer was sustained by the trial court, but judgment was rendered for the enforcement of the lien only, and the question of personal judgment against Ryan was reserved.

In the first paragraph he pleads no consideration for the assignment from the Town Company to the Town Lands Company; but in the same paragraph nullifies that denial by admitting the consideration of the Town Lands Company succeeding to the rights, properties *and liabilities* of its assignor.

The second paragraph is an attempt to plead no consideration; but is inconsistent with the admission that the notes were executed for the lot in question, which was of value, though claimed to be of less value than the face of the note.

The third paragraph is an averment in general terms that the execution of the notes was procured by fraud, covin and misrepresentation of the Town Company and its agents. This is claimed to be defective, because it does not state

the facts which constitute the fraud, covin and misrepresentation.

The fourth paragraph is objected to for the same reason, it averring merely that the assumption to pay the purchase money notes by Ryan was procured by the fraud, covin and misrepresentation of the Town Company and its agents.

Appellant's complaint as to the ruling on the demurrer to the third and fourth paragraphs of his answer seems to us, upon examination, to be well founded, and the trial court erred in sustaining the demurrer. (*Whitehead v. Root*, 2 Met., 538; *Ross v. Braydon*, 2 Dana, 161; *Sharp v. White*, 1 J. J. Mar., 106; *Boyd v. Smoot*, 5 R., 119; *Newman's Pleading & Practice*, 543.)

The fifth paragraph undertakes to set up specifically fraudulent misrepresentation. But all the averments are as to promises for the future, with one exception. It was averred that various industrial enterprises would be established by various corporations and persons, which would give employment to a great number of people, and thereby increase the value of the property. It is true there is an averment that representations were made "that these plants and enterprises had been secured by contract between said company and the parties and corporations proposing to erect and operate same, to locate at Middlesborough," and also that these representations were false and fraudulent; but the paragraph specifies wherein they were false, viz; in that a number of the enterprises were never erected or operated in or about the town. We are of opinion that the pleading fairly construed bases the falsity of these representations upon the fact that the enterprises were not established, and not upon any claim that there were no contracts for their establishment at Mid-

dlesborough. Nor was it averred that the company or its agents had knowledge of the falsity of the representations of existent facts, or, without knowledge of their truth, asserted their truth as having knowledge. Moreover, it is not alleged that but for these representations appellant would not have purchased.

As to the promissory representations, it seems to be well settled that promises as to the future, whether to be performed by the vendor or a third person, are not a basis for legal or equitable relief, unless incorporated in the contract, or averred to have been omitted therefrom by fraud or mistake. As said by Judge Daniel in *Turner v. Navigation Co.* (2 Dev. Eq., 239):

"If there was no fraud in making the sale and obtaining the bond, parol evidence is inadmissible for the purpose of annexing a condition to the written deed, which appears on its face to be absolute and unconditional. Any declarations made at the time of the sale by the vendor, relative to the property, if not incorporated in the written contract of sale, are presumed to have been abandoned by the parties, as forming no part of it. They are not to be proved by parol, to explain the contract, or in any way to affect it, except when it is alleged that they were false, and so known to be by the vendor at the time, and were spoken with a view to commit a fraud on the vendee."

See also 8 Am. & Ency. of Law, p. 637, note 1; note G to *Hedin v. Minn. Med. & Surg. Inst.*, 35 L. R. A., 420-21; note to *Fargo Gaslight & Coke Co. v. Fargo Gas & Electric Light Co.*, 37 L. R. A., 607; *Sawyer v. Prickett*, 86 U. S., 146.)

We have been cited to no case holding that representations regarding the future furnish ground for relief, either by action for deceit or for rescission of a contract.

The questions arising in this case are settled by the case of *Livermore v. Middlesborough Town Lands Co.*, this day decided, except as here indicated.

For the error in sustaining the demurrer to the third and fourth paragraphs of the answer the judgment is reversed and cause remanded for further proceedings consistent herewith.

The whole court sitting, Judge Guffy dissenting.

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CASE 16—ACTION TO ENFORCE BUILDING AND LOAN MORTGAGE—MARCH 14.

Peoples' Saving & Building Association v. Denton.

APPEAL FROM HENDERSON CIRCUIT COURT.

**BUILDING AND LOAN ASSOCIATIONS—EXPENSES.**—Where a going building and loan association, in a contest for the enforcement of a borrowing member's mortgage, makes it appear with reasonable certainty that the profits or dividends distributable to a borrowing member's stock are not sufficient to cover his proportionate share of expenses, and losses in running the business, it may recover of such borrower his proportion of such expenses and losses; but in estimating such losses it must appear that they do not include losses incurred in having to repay usury to its borrowing members.

**E. G. SEBRE, JR., FOR APPELLANT.**

A building and loan association has a right to charge its members fines for failure to comply with its by-laws, and reasonable sums as expense dues for maintaining and carrying on the business. *Ky. Stats.*, sec. 867; *Herbert, &c., v. Kenton Bldg. & L. Assn. of Covington*, 11 Bush, 304; *Henderson Bldg. & L. Assn. v. Johnson*, 88 Ky., 197; *Rogers, Recr., v. Rains*, 18



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People's Saving and Building Association v. Denton.

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Ky. Law Rep., 771; Endlich on Bldg. & L. Assns., p. 530; Simpson v. Ky. Citizens' Bldg. Assn., 41 S. W. R., 571.

SAME COUNSEL FOR THE APPELLANT IN A PETITION FOR A REHEARING.

Additional citation: Reddick v. U. S. Bldg. & L. Assn., 49 S. W., 1075.

(No brief on file for the appellee.)

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In March, 1888, appellee borrowed from appellant, a building and loan association, the sum of \$600; and, after paying divers sums, was adjudged, at the suit of the association, to owe a balance on his indebtedness of \$145.47, as of May 25, 1897. A judgment of sale to satisfy this sum was accordingly entered, and the question of further indebtedness was reserved by the lower court for future decision. Subsequently the plaintiff filed what is termed a "second amended petition," and in this the terms of the contract of loan were, in effect, ignored or abandoned, and the account of the appellee, beginning at the date of his loan, and embracing all his payments, of whatever character, is so recast as to show a balance due the association of \$290, less the sum of \$145.47, for which judgment has already been entered. The appellant's plan of thus recasting the account consists in charging appellee with the amount of his loan, with legal interest until the end of a year. Then the payments made during the year, with interest thereon for the average time, are ascertained and lessened by what is termed "expense rate per share." This last result, taken from the principal and interest, gives a new principal; and so on for each year. On final hearing the court held that its former judgment gave all the relief to which the plaintiff was entitled, and dismissed the action. The association appeals, and brings

up only the record of the proceedings below after the filing of its second amended petition.

We are to assume that the court below, on a proper state of pleading, gave judgment for the plaintiff's debt, with legal interest, less all payments made by him, whether as dues, interest or premium. And this principle seems not to be combatted, as far as it goes; but it is contended by the association that the court refused to render judgment for any fines against the delinquent member, or any expenses or losses incurred by it whilst he was a member.

As to the fines, there is nothing to show what was done with respect thereto by the court below, and we need not consider this subject further.

On the other branch of the case an interesting question is presented. It has been said by this court in several of the cases that a member of these associations is liable for his *pro rata* share of the expenses of maintaining the organization, notwithstanding which no association has ever sought directly a recovery against its delinquent member on account of his liability on this behalf, except incidentally in the Eckler case (recently decided), [50 S. W., 50], and in the present case. It may be that in such cases, if an exhibit were made on the one hand of the member's share of profits in the partnership, and on the other of his share of expenses and losses, there would be nothing coming to the association on the account. This assumption, however, may be erroneous. If so, and it can be made to appear that the profits or dividends distributable to a delinquent borrowing member's stock are not sufficient to cover his proportionate share of expenses and losses in running the concern, then we are prepared to say what we have often said, that the delinquent mem-

ber is chargeable with his share of such expense and loss. The association must, however, show this satisfactorily. It is enough to condemn the showing made on this behalf in the present case to find that the loss account charged to appellee embraces the amounts which the association has lost by its failure to collect usury off certain of its delinquent members. These alleged losses are not losses proper. The stockholders have simply failed to make certain profits to which they laid claim under usurious and unlawful contracts. These contracts ought not to have been made, and the amount of usury embraced in them is not a loss to the association, save as it is a curtailing of expected profits. The appellee is no more chargeable with this alleged loss than he is chargeable with the usurious amount embraced in his own contract. The plan adopted in this case would seem to be unobjectionable, if the association had followed this course of conducting its business; and it would still seem to be possible of adoption in settlements with delinquent members in going concerns, if, on a full exhibit of the expense and loss account, giving the items in detail, there is found charged to the member no "loss" growing out of usurious contracts; and it further appears that no more is charged to the delinquent than his just share of the expense and loss of the association. The plan adopted, with usury losses excluded, avoids the rather oppressive system of compounding interest monthly as payments are usually made in these associations, and applies every dollar of the member's payments to the extinguishment of his debt and the legal interest thereon, computed at the rate of six per cent. per annum. The only fault in its application to the present case is that so-called usury losses are included in the calculation.

So far as we are able to see from the record before us, the balance due from the appellee to the association, as found by the chancellor, ought not to be increased. Wherefore the judgment dismissing the action is affirmed.

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CASE 17—CONSTRUCTION OF WILLS—MARCH 15.

Atchison, Executor, Etc. v. Atchison, Etc.

APPEAL FROM WARREN CIRCUIT COURT.

1. CONSTRUCTION OF WILLS—CONTRIBUTION.—A widow who takes under her husband's will takes as any other devisee and is liable to contribution to pay the debts of the estate in proportion to the value of the realty and personalty devised and bequeathed to her.
2. SAME.—There is nothing in the will construed in this case to indicate an intention on the part of the testator that the widow should be exempt from the burden of contribution for the payment of his (testator's) debts.

WRIGHT & McELROY FOR THE APPELLANT.

1. There is no proof to show that the testator intended that his widow should get her bequest free of the debts of the testator.
2. The widow should contribute to the debts of her husband in proportion to the property received by her.

WILLIAM H. HOLT ON THE SAME SIDE.

There is no evidence that the testator intended the wife's devise to be free of any encumbrances. The time for the renunciation of the will had gone by and the widow took the portion of the estate devised to her as any other devisee. Ky. Stats., sec. 1404; Huhlein v. Huhlein, 87 Ky., 247.

B. F. PROCTOR FOR THE APPELLEE.

The failure of the widow to renounce the will arose from the inability on her part to ascertain the status of the estate aris-

Atchison, Exr., &c., v. Atchison, &c.

- ing from the failure of the representative to file an inventory within the time required by law.
2. It was the intention of the testator to have the real estate devised to his wife unencumbered and besides that, to leave her a surplus of personal property, and in such judgments the court tried to carry out the intention of the testator. *Chamberlain v. Young's Exr.*, 9 Ky. Law Rep., 270.
  3. If the court did not reach this conclusion, it would have been its duty to leave her the liberty under the statutes to renounce the will and take the interest allowed her by the statute. *Smither v. Smither's Exr.*, 9 Bush, 230, and authorities cited.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

J. C. Atchison devised certain real estate to his son, A. J. Atchison, and to his widow, H. N. Atchison, he devised, during her life, the home place, situated at Bowling Green, Ky., and the interest and remainder therein to the son named. He devised to the son his watch, old family Bible and clock, and the personal estate goes to the son and widow in equal parts. The son named qualified as executor of the will, and no personal estate came into his hands except a share of turnpike stock of the value of \$25 and a small dividend thereon, and the commissioner found that there was in his hands, due his father's estate, some \$67, rents collected in the lifetime of the testator. The commissioner ascertained the debts of the estate to be \$790, among which was a debt due the widow of \$200, and some interest, which was paid by the son. There was no personal estate except that which we have stated with which to pay the testator's debts. The widow did not renounce the provisions of the will within the time prescribed by the statute; neither did she get the chancellor to extend the time for that purpose.

When a widow claims under the will, she occupies the

same attitude as any other devisee. *Chambers and wife v. Davis, &c.*, 15 B. Mon., 522.

When she takes under the will of her deceased husband, she takes it subject to his creditor's demands. *Watson v. Christian*, 12 Bush, 524. The burden accompanies the benefit. *Huhlein v. Huhlein*, 87 Ky., 247, [8 S. W., 260].

Under a will, those who receive bequests are required to contribute to the payment of the debts of the estate. Our attention has not been called to any case wherein the court has decided what proportion of the burdens shall be borne by devisees. It is manifestly just, however, that each devisee should pay ratably the debts of the estate, according to the value of the estate received under the will; otherwise an estate in realty might be large, with large debts against it, and, if each devisee was required to contribute the same amount to the payment of the debts, regardless of the value of the bequests, then those receiving an interest of small value might be required to exhaust the entire amount in the payment of debts, whilst those who received a large bequest would have remaining large interests in the estate. The commissioner was under the impression that each of the devisees was to pay one-half of the debts of the estate.

It is made manifest by this record that the value of the estate received by A. J. Atchison was twice as great as that received by the widow. He did not only receive certain real estate in fee, but was also willed the interest in remainder in the homestead in which the widow was given a life estate.

The court below should have ascertained the value of the estate, including the remainder interest, which was willed to A. J. Atchison, and the value of the life estate bequeathed to the widow, and required them to contribute to

the payment of the debts of the estate according to the value of their respective interests. The court disregarded the report of the commissioner, and refused to compel the widow to contribute anything in the way of the payment of the debts of the estate; besides rendered judgment against the personal representative of A. J. Atchison (he having died pending the suit) for \$200, the amount which the court found he had collected in rents on the property devised to the widow. This was erroneous, because the widow should have been charged with her proportionate part of the debts of her husband's estate under the rule announced herein, and should have been credited with the net amount of rents which the son had received arising from her property after the death of her husband.

The court gave as its reasons for its judgment in the following language, to-wit: "From the proof in this case and the will of J. C. Atchison, it was evidently his intention to leave to his wife her interest in his estate without incumbrances and that he had conveyed to A. J. Atchison, during his life, property, with the understanding that he should not want for a sufficient support during his life." There is nothing in the language of the will, in our opinion, which justifies this conclusion; neither is there any testimony in this record which shows that, as a consideration for any conveyance of property which the father made to the son, there was imposed upon him an obligation to support the father during his lifetime, or to pay his debts existing at his death. The judgment is reversed for proceedings consistent with this opinion.

## CASE 18—RESCISSION—MARCH 15.

## Jones v. Middlesborough Town Lands Co., Etc.

## APPEAL FROM BELL CIRCUIT COURT.

1. **RESCISSION—FRAUD OF REMOTE VENDOR.**—A vendee of lands, when sued for unpaid purchase money, can not rely for a rescission upon the fraud of a remote vendor, but is limited to fraud of his immediate vendors or their agents.
2. **RESCISSION FOR FRAUD.**—In order to establish fraud against which equity will relieve, it must appear that the misrepresentation was of a material fact (as distinguished from opinion), at the time or previously existing (and not a mere promise for the future); must be relied upon by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not justify a belief of its truth. Tested by this rule the defendant failed to make out a case of fraud entitling him to a rescission of his contract of purchase. (*Livermore v. Middlesborough Town Lands Co.*, page 140 herein.)

**BECKNER & JOUETT, JAMES M. BENTON AND T. L. EDELEN.**  
FOR APPELLANT.

1. A false representation, though innocently made, is ground for rescission. *Pomeroy's Eq. Jur.* (2d ed.), vol. 2, sec. 889; *Prewitt, Trustee, v. Trimble*, 13 Ky. Law Rep., 581; *Trimble v. Reid*, 17 Ky. Law Rep., 496; *Story's Equity*, sec. 198; *East v. Matheny*, 1 A. K. Mar., 192; *Shackelford v. Handley*, *Ibid*, 500; *Joice v. Taylor*, 25 Am. Dec., 325 (Md.); *Converse v. Blumrich*, 90 Am. Dec., 241 (Mich.); *Tyson v. Passmore*, 44 Am. Dec., 183 (Penn.); *Wilson, Trustee, v. Carpenter's Admr.*, 91 Va., 183.
2. Where several misrepresentations have been made the court will not undertake to say which one may have influenced the contract. *Pomeroy's Eq.*, sec. 880-890; *Reynell v. Sprye*, 1 DeGex, M. & G., 660, 708-9; *Linhart v. Forman*, 77 Va., 540.
3. That the means of knowledge were equally open to the other party, and that he might have known the facts by an investigation, will not relieve from the effects of a misrepresentation.



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Jones v. Middlesborough Town Lands Co., &c.

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Wilson, Trustee, v. Carpenter's Admr., 91 Va., 183; Trimble v. Ward, 17 Ky. Law Rep., 511; Kerr on Fraud, pp. 79-81; Bigelow on Fraud, 523; Reynell v. Sprye, 1 DeGex. M. & G., p. 710; Price v. Macauley, 2 DeGex., M. & G., p. 346; Redgrave v. Hurd, L. R. 20 Ch. Div., pp. 13, 14, 22, 23; Pomeroy's Eq., vol. 2, sec. 895 and note.

4. Has there been a waiver of the right to rescind? Wilson, Trustee, v. Carpenter's Admr., 91 Va., 183; Redgrave v. Hurd, L. R., 20 Ch. Div., 1 (1891) pp. 13-14.
5. That the fact, however, concerning which the statement is made is in the future, does not of itself prevent the misrepresentations from being fraudulent. Pomeroy's Eq., sec. 878; Sutton v. Morgan, 158 Penn. St. Rep., 204; Rorer Iron Co. v. Trout, 83 Va., 397; Moore v. Cross (Tex.) 26 S. W. R., 122.
6. When a party makes an affirmation, positive in form, it is to be taken as made of his own knowledge and not as upon information or belief. Knappen v. Freman, 47 Minn., 491.
7. A statement recklessly made, without knowledge of its truth, but which is really false, is a false statement knowingly made, within the settled rule. Cooper v. Schlesinger, 111 U. S., 148, cited in Trimble v. Reid, 17 Ky. Law Rep., 497.
8. Some instances in which courts rescind similar contracts. Sutton v. Morgan, 158 Penn., 204; Gate City Land Co. v. Heilman, 80 Iowa, 481; Wilson, Trustee, v. Carpenter's Admr., 91 Va., 183; Moore v. Cross (Tex.) (1894), 26 S. W. R., 122; Ross v. Hobson, 131 Ind., 170, and other cases cited in brief.
9. If the real estate agents who sold the lots to Judge Jones were not in fact the agents of Dodge, Slade, &c., yet the latter by executing deeds to Jones in which they name themselves as his vendors held themselves out to him as principals in the transaction, and thereby adopted all the acts and representations of the agents, among others the representation that they were the agents of Dodge, Slade, &c. Busch v. Wilcox, 82 Mich., 386; German Natl. Bank v. Butchers' H. & T. Co., 97 Ky., 34; Farrell, &c., v. Bradford, &c., 50 Am. Dec., 300.

W. E. CABELL AND ISAAC T. WOODSON FOR APPELLEES.

1. As to agency. Story on Agency, sec. 136, note; Reed v. Brooks, 3 Litt., 127; Mechem on Agency, ar. 285, 287, 706, 743; Van-ada's hrs. v. Hopkins', Admrs., 1 J. J. Mar., 291; Reed, &c., v.

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Jones v. Middlesborough Town Lands Co., &c.

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- Welsh, 11 Bush, 459; Com. v. Hawkins, 83 Ky., 246; Dehart v. Wilson, 6 Mon., 577.
2. As to what constitutes fraudulent representations. Pomeroy's Eq. Jur., sec. 878; Fisher v. May, 2 Bibb., 450; Benj. on Sales, pp. 561, 641; Marshall v. Peck, 1 Dana, 612; Thomas v. McCann, 4 B. Mon., 601; Pomeroy's Eq. Jur., sec. 891; Chambers v. Baptist Ed. Society, 1 B. Mon., 222; Huls v. Black, 14 Ky. Law Rep., 805; Tanner v. Clark, 13 Ky. Law Rep., 923; Waters v. Mattingly, 1 Bibb., 244; East v. Matheny, 1 A. K. Mar., 292; Shackelford, &c., v. Hendley's Exrs., 1 A. K. Mar., 496; Stewart v. Dougherty, 3 Dana, 481; Ball v. Lively, 4 Dana, 370; Buford v. Brown, 6 B. Mon., 557; Campbell v. Hillman, 15 B. M., 518; Phelps v. Quinn, 1 Bush, 378; Matthey v. Wood, 12 Bush, 294; English v. Thomasson, 82 Ky., 280; Prewitt v. Trimble, 13 Ky. Law Rep., 581; Marksbury, &c., v. Taylor, &c., 10 Bush, 523; Story's Eq. Jur., secs. 193, 190; Benj. on Sales, secs. 638, 675.
  3. Is appellant in a position to avail himself of the charges of fraud presented in this petition? Pomeroy's Eq. Jur., secs. 897, 892, 893; 8 Am. & Eng. Ency. of Law, 803, sec. 13; Lightburn v. Cooper, 1 Dana, 275; Story's Eq. Jur., 1539; Moore v. Turbeville, 2 Bibb., 602; First Natl. Bank of Stanford v. Mattingly, 14 Ky. Law Rep., 68; Peak v. Gore, 15 Ky. Law Rep., 279; Trimble v. Ward, 17 Ky. Law Rep., 509; Bigelow pp. 528, 532, 533; Am. & Eng. Ency. of L., vol. 8, p. 805. sec. 16 and notes.

**FALCONER & FALCONER FOR APPELLEES, DODGE, SLADE & WRIGHT.**

1. Were Gess, Bosworth & Irvine or Browning, Rogers & Searce the agents of Dodge, Slade, Wright, &c., to make any representations about Middlesborough at the time that the options were given upon said lots to L. H. Jones?
2. If they were the agents of Dodge, Slade, Wright, &c., what authority did they have to make such representations so as to bind the said Dodge and others?
3. If such representations were made, were they as to matters within the knowledge of said agents, or were they merely expressions of opinion as to what probably would be done by the Middlesborough Town Company or other parties.
4. Said representations if made at all were as to collateral matters and not with regard to the property subsequently purchased by Jones.

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Jones v. Middlesborough Town Lands Co., &c.

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5. The representations alleged to have been made were not made at the time the property was sold to L. H. Jones.
6. The defendant and cross petitioner, L. H. Jones, had the same opportunities of ascertaining what was proposed to be done in Middlesborough, as the said Dodge, J. T. Slade, T. C. Wright and others or either of the agents that he claims he was dealing with.
7. This property was purchased by Jones in 1890, and he made no complaint nor any attempt to rescind the contract until several years thereafter.

Citations: Story on Agency, sec. 135; Reed v. Brooks, 3 Litt., 127; Roberts, &c., v. Burks, Litt. Select Cases, 411; Mechem on Agency, secs. 714, 715; Corbett v. Gilbert, 24 Ga., 454; Reeves v. Dennett, 145 Mass., 23; Campbell v. Hillman, 15 B. M., 517; Lawrence v. Gayetty, 78 Cal., 126; s. c. 12 Am. St. Rep., 29; Gage v. Lewis, 68 Ill., 604; People v. Healy, 128 Ill., 9; s. c. 15 Am. St. Rep., 90; Burt v. Bowles, 69 Ind., 1; Long v. Woodman, 58 Mo., 49; Dawe v. Morris, 149 Mass., 188; s. c. 14 Am. St. Rep., 404; Knowlton v. Keenan, 146 Mass., 86; s. c. 4 Am. St. Rep., 282; Gallagher v. Brunel, 6 Cow., 347; Lexon v. Julian, 21 Hun, 577; Farra v. Bridges, 3 Humph., 566; Fenwick v. Grimes, 5 Cranch C. C., 439; Peake, &c., v. Gore, 94 Ky, 536; Bigelow on Fraud, vol. 1, p. 776; Hedden v. Griffin, 126 Mass., 229; Joliffe v. Baker, L. R. 11 Q. B. D., 255; Huls, &c., v. Black, 14 Ky. Law Rep., 806.

**SAMPSON & CHAPMAN FOR APPELLEES, MIDDLESBOROUGH TOWN CO. AND  
MIDDLESBOROUGH TOWN LANDS CO.**

1. As to sufficiency of matter to constitute counter-claim or cross-petition, Civil Code, sec. 96, sub-secs. 1 and 2.
2. Sufficiency of allegations. Pomeroy's Eq. Jur., vol. 2, secs. 815, 856; Jasper v. Hamilton, 3 Dana, 284; Marshall v. Peck, 1 Dana, 609; Ball v. Lively, 4 Dana, 370; First Natl. Bank v. Mattingly, 14 Ky. Law Rep., 69; White v. Ewing, 69 Fed. Rep., 451.

**JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.**

During the boom days of the city of Middlesborough, the Middlesborough Town Company sold and conveyed to Isaac T. Woodson and others certain lots in that city.

They sold and conveyed them to Asa Dodge and others, from whom the appellant, Jones, claims he purchased them in the early part of January, 1890. Woodson and his associates paid part of the purchase money on the lots, and executed their notes for the balance of it. Dodge and his associates paid Woodson and his associates the purchase money, less the notes which Woodson and his associates had executed to the Middlesborough Town Company. Jones made a large payment on his purchase, and seems to have assumed the payment of the notes due the Middlesborough Town Company. The Middlesborough Town Company assigned the notes to the appellee, Middlesborough Town Lands Company, another corporation, by which this suit was brought to enforce their payment. Jones denies his liability to pay the notes, and seeks a rescission of the contract of sale, which he claims was made between himself and Dodge and his associates, upon the ground that fraud was practiced upon him which induced him to enter into the contract. Dodge and his associates claim that they had sold to one Wright part of the lots which they bought, and had given an option to certain real estate firms in Middlesborough on the others, and that they did not sell them to Jones, but simply executed deeds to him, as was the custom in Middlesborough in such transactions, instead of the parties to whom they had given options. However, we will not go into a discussion of that phase of the case, but will assume that Dodge and associates, through their agents, sold the lots to Jones.

In his pleadings Jones avers that, preceding a public sale of lots in the city of Middlesborough, the Middlesborough Town Company, by a prospectus, publications in the newspapers, and in various

ways, represented that certain streets and avenues of the city would be constructed in a way that would be useful and beautify the city; that sundry and divers enterprises, requiring the expenditure of millions of dollars, would be established at Middlesborough, and that they would employ thousands of men; that various railroads would be brought to Middlesborough; that mines would be opened and worked; that a street railway would be built and put in operation; that in the representations the capacities of various industries which were to be established were given, and the number of men each would employ, etc.

It, is unnecessary to enumerate the various manufacturing establishments and business enterprises which were to be brought to Middlesborough. It is averred that some of them came, but none of them were of the proportions as represented; that they did not employ the number of men which it was represented they would employ; that nearly all the enterprises which it was represented would come there failed to come, etc.

He also avers that certain persons, representing his vendors as agents, repeated these representations, and that he entered into the contract of purchase relying upon the representations as true. It is denied by his vendors that any fraudulent representations were made to him by themselves or agents, or that he was induced to enter into the contract by reason of any fraudulent representations. We see no connection between the representations of the Middlesborough Town Company and those of Dodge and his associates which could affect the question involved in this case. Dodge and his associates owned the lots; they did not represent the Middlesborough Town Company in the sale of the lots to Jones. Long before that time the

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Jones v. Middlesborough Town Lands Co., &c.

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Middlesborough Town Company had sold the lots to Woodson and his associates in the manner we have stated, and they do not complain that it induced them to buy the lots by fraudulent representations. If Jones is entitled to a rescission of the contract, it must be had by reason of the fraudulent conduct of his immediate vendors or their agents.

The evidence in this case does not show that Dodge and his associates, or their agents, ever represented to Jones that they would bring, or would be instrumental in bringing, a single enterprise to Middlesborough which he claims he expected would be established there. The record shows that whatever enterprises were to come there were not to be brought through the influence of his vendors, but through that of the Middlesborough Town Company, or some one else not interested in the lots which he was buying. No promise which his vendors made was violated.

It is evident, from the record in this case, that those who were buying lots in Middlesborough knew that the town was being boomed for speculative purposes. There were evidences from the money which was being expended in the town, and which was thereafter expended, which were calculated to make those who lived in the town or visited it hope that it would become a city of considerable importance. Irvine, who represented one of the real estate firms through whom Jones claims he purchased part of the lots, formerly lived in the city of Winchester, and was a neighbor of Jones. He had not been in Middlesborough more than five or six days before Jones went there. Jones knew of this fact, and that his opportunity for obtaining actual knowledge as to the real situation of the city of Middlesborough was necessarily limited.

The information which the real estate agents gave Jones was obtained in the same manner the general public had obtained its information with reference to the prospects of Middlesborough. They were evidently engaged in the same business that everybody else was who went there to boom the town and invest in real estate. He could not help knowing, by the exercise of ordinary judgment, that the statements which were made to him with reference to the various enterprises which were commenced, and those which were to be brought there, were mere opinions. They were made at a time when the agents did not have in view the sale of the lots in question to him. The evidence in this record does not establish the fact that they attempted to practice any fraud upon him, or made representations to him which they believed to be untrue, and the circumstances under which they made the statements and representations were such as to justify a belief in their truth.

This court has recently had under consideration the case of *Livermore v. The Middlesborough Town Lands Co.*, *herein*, 140 [50 S. W., 6], involving somewhat of a similar question to the one here for consideration, and, after reviewing many authorities, it said:

"To establish actionable fraud, or fraud against which equity will relieve—and, as we have seen, the same rule applies in Kentucky to both classes of cases—it must appear that the misrepresentation was a matter of material fact, (as distinguished from opinion), at the time or previously existing, (and not a mere promise for the future), must be relied upon by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not

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Potts, &c., v. Park.

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justify a belief in its truth. This is the doctrine deducible from the Kentucky decisions."

In view of the fact that the court in that case has so fully reviewed the authorities, and has reached the conclusion we have stated, it is deemed unnecessary to discuss further the law applicable to this case.

The opinion this day delivered in Pine Mountain Iron and Coal Co. v. Ford, [50 S. W., 27], is in line with the case from which we have just quoted. The judgment is affirmed.

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## CASE 19—FERRY CASE—MARCH 15.

## Potts, Etc. v. Park.

## APPEAL FROM ESTILL CIRCUIT COURT.

**FERRIES—RIGHT A MERE PRIVILEGE.**—A ferry right granted under the statutes is a mere privilege which the owner has no right to encumber so as to interfere with the performance of his duties to the public; hence, a contract to ferry one and his family is not binding on the successor to the ferry-owner after the expiration of the period for which the franchise was granted.

**J. B. WHITE FOR THE APPELLANTS.**

1. Where a purchaser of a ferry by executory contract has not paid for the property, a contract by him with an individual for ferrying him and his family is a mere personal contract and does not attach to the ferry proper, nor will it be affected if reduced to writing and recorded. Such instrument is not recordable. Ky. Stats., ch. 29, sec. 500.
2. Parrish bought the property without notice alleging perpetual right.
3. Although the original contract may have been valid, equity should not aid appellee in enforcing it as it is an unconscionable contract. *White v. Cates*, 7 Dana, 358; *Greer v. Boone*, 5 B. M., 560; *Shortridge v. Bartlett*, 14 B. M., 200; Ky. Stats., sec. 500.



W. S. PRYOR AND COURTLAND P. CHENAULT ALSO FOR APPELLANTS.

Appellants had no actual notice of the contract between their remote vendors and the appellee, and in the absence of such notice they are not in any way bound by the contract. The contract was not a recordable instrument and therefore the fact that it was of record was not constructive notice.

RIDDELL & RIDDELL FOR THE APPELLEE.

1. The contract is admitted, or at least not denied. It was an interest in land, a hereditament and therefore recordable. *Dufour v. Stacy*, 90 Ky., 14, and authorities there cited; *Hazlip v. Lindsey*, 93 Ky., 14; *Revised Stats.*, p. 293, sec. 13; *Ray v. Sweeney*, 14 Bush, 1; 7 Am. & Eng. Ency. of Law, 942, and authorities cited.

SAME COUNSEL FOR THE APPELLEE IN A PETITION FOR A REHEARING.

1. The pleadings and proof show a recognition of the contract made by Thomas W. Adams with the appellee and an acquiescence therein and the performance thereof from the 23d of September, 1873, to December, 1894.
2. The parties to the contract and their successors have been in the enjoyment of the consideration of the contract from the time of the execution of the contract to the present time and they are therefore bound by its terms.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

Appellee sought in this action to enjoin and restrain appellants, as the owners of what is known as the "Upper Ferry," across the Kentucky river at Irvine, from collecting ferriage from himself or any member of his family, and from interfering with a fence across the ferry property on the south side of the river.

The basis of appellee's claim is the following recorded written agreement with Thomas W. Adams, who was at that time operating the ferry in question:

"Article of agreement, made and entered into this 23d day of September, 1873, by and between W. W. Park and Thomas W. Adams, both of Estill county, Kentucky,

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Potts, &c., v. Park.

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witnesseth: That said Adams agrees and binds himself and his heirs and assigns to ferry said Park or his successors, family, and all necessary ferrying for the family, including wagons, buggies and work hands, when on said Park's or his successors' business. In consideration for the above-named ferriage, said Park grants said Adams and his successors the privilege of tying his ferry rope to the sycamore tree above the ferry, or, should said tree be destroyed, then said Adams is to have the privilege of putting up a post sufficient to tie to anywhere that may be necessary for said ferry, or to tie to any other tree. Said Adams is to have the privilege of a landing forty feet wide on the south side of the river. Said Park is to have the privilege of running a fence to the river across the land of said Adams just above the ferry. In witness whereof we have hereunto signed our names.

"W. W. PARK,

"THOMAS W. ADAMS."

Appellee alleges that between the date of this contract and the acquisition by appellants of the right to operate the ferry in question, it has changed hands several times, and that each succeeding owner had acquired with full knowledge of this contract and appellee's claim to free toll; that each succeeding owner had performed the contract according to its terms, but that appellants, in December, 1894, had refused to do so; and he asked the chancellor to enforce his contract and restrain appellants from collecting or attempting to collect tolls from himself or his family.

Defendants, by way of answer, denied that they had ever agreed to assume or perform the conditions of this contract, or that it was in any wise binding or enforceable against them. They alleged that they were not using

any part of the forty feet of land leased to Adams, or the sycamore tree, in the operation of the ferry; and the evidence of Parrish and McSwain, appellants' immediate vendors, is to the effect that there was no express undertaking or agreement on their part or that of appellants to perform the contract between appellee and Adams; but that, on the contrary, when the attention of S. D. Parrish, the vendor of appellants, was called to the contract in question, long after his purchase from McSwain, he repudiated it, and refused to be bound thereby.

The question before us is: Did the agreement entered into between appellee and Adams, in 1873, impose a perpetual burden in favor of appellee upon the ferry franchise, or was it a mere personal contract, binding alone upon the original parties so long as Adams operated the ferry?

Section 1802 of the Kentucky Statutes provides "that no ferry privilege shall hereafter be granted for a longer period than twenty years," and this was also a provision of the General Statutes. The right of ownership in a ferry is only a qualified one. It is a mere privilege. Power is given to the several county courts of this Commonwealth to "grant, regulate and revoke" the privilege, and the public has distinct rights with reference thereto; and the owner of such a privilege has no power to encumber the franchise by burdens, the tendency of which would be to destroy its usefulness. If the temporary owner of such a privilege could make contracts by which, in consideration of certain benefits to himself, the franchise was to be perpetually incumbered by burdens in the nature of free tolls to individuals, it is evident that it would be in his power to render the franchise worthless, and to make it impossible to perform the duties to the public

M. V. Monarch Co. v. Farmers & Traders' Bank.

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imposed upon him by the grant of the privilege to operate the ferry.

The proof shows that the use of the land owned by appellee on the south side of the river, or of the tree mentioned in the contract, is not essential to the proper operation of the ferry, or to the discharge of the duties imposed by law upon the owners thereof. They were at best but a mere temporary convenience and economy to Adams, and the contract was binding only upon him or his successors so long as they voluntarily continued to use the property of appellee, and the same can not be enforced against remote successors, long after the time when, by limitation, the franchise had expired.

For the reasons indicated, the judgment is reversed, and the cause remanded, with directions to dissolve the injunction and dismiss plaintiff's petition.

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CASE 20—MOTION FOR DAMAGES—MARCH 16

M. V. Monarch Co. v. Farmers and Traders  
Bank.

APPEAL FROM DAVIESS CIRCUIT COURT.

**APPEALS—DAMAGES ON AFFIRMANCE.**—A motion for damages on affirmation will be denied when the supersedeas bond is not a part of the record when the judgment of the trial court is affirmed.

**SWEENEY, ELLIS & SWEENEY FOR THE APPELLEE AND FOR THE  
MOTION TO FILE THE SUPERSEDEAS BOND AND FOR DAMAGES THEREON.**

(No brief on the motion.)

**WALKER & SLACK FOR THE APPELLANT.**

(No brief on file touching the motion.)

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Section 764 of the Civil Code provides that "upon the affirmance of, or the dismissal of an appeal from, a judgment for the payment of money, the collection of which, in whole or in part, has been superseded, as provided in chapter 2 of this title, ten per cent. damages on the amount superseded shall be awarded against the appellant."

The judgment appealed from in this case was for money, and it has been affirmed by this court (20 Ky. Law Rep., 1275), but upon its affirmance, that is, at the time of its affirmance, there was no copy of the supersedeas bond in the record showing that the judgement appealed from had been superseded.

It has been the practice in this court, long adhered to, and without an exception to our knowledge, to deny to an appellee under the circumstances noted the claim for damages. And the motion therefor herein is overruled.

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CASE 21—ACTION TO RECOVER LICENSE FEE PAID—MARCH 16.

106	807
117	802
118	640

## Fidelity & Casualty Company v. City of Louisville, Etc.

APPEAL FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

CONSTITUTIONAL LAW—MUNICIPAL ORDINANCE IMPOSING LICENSE FEE.

—Under sections 174 and 181 of the Constitution, section 3011 of the Kentucky Statutes, conferring authority upon cities of the first class to require casualty and indemnity companies to pay into the sinking fund not less than two dollars nor more than three dollars on every one hundred dollars of premiums received on business during the previous year, is a valid exer-

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Fidelity and Casualty Company v. City of Louisville, &c.

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cise of power; and an ordinance enacted pursuant to such section of the statutes is valid.

**PHELPS & THUM AND LANE & BURNETT FOR APPELLANT.**

(Brief withdrawn.)

**H. L. STONE FOR THE APPELLEES.**

1. There is no discrimination in the ordinance between foreign and domestic corporations.
2. The ordinance of the city is in strict conformity to the authority given to the appellee by the Legislature, whether the same be strictly a license tax or income tax it is authorized under sections 171 and 184 of the Constitution and the authority granted by the General Assembly to the appellee—the city of Louisville. *Levi v. City of Louisville*, 97 Ky., 412.
2. The license or income tax imposed by the ordinance was voluntarily paid and without any compulsion on the part of appellees or either of them. If the ordinance had been invalid, the opportunity to test same was given by section 2922 of the Kentucky Statutes, and the appellant not having availed itself of this opportunity is now precluded from recovering the amount paid. *Com v. L. & N. R. R. Co.*, 89 Ky., 539.

**JUDGE WHITE DELIVERED THE OPINION OF THE COURT.**

By section 2 of an ordinance of the general council of the city of Louisville, approved January 29, 1894, titled, "An ordinance concerning licenses on certain business in the city of Louisville," it is provided: "Every life, fire, accident, casualty and indemnity insurance company, title company, title insurance company or abstract company doing business in the city shall, on or before the first day of February of each year, pay to the sinking fund the sum of two dollars on every one hundred dollars of premium received on business done in the city of Louisville the previous year."

By section 6 of the same ordinance it is provided: "All licenses shall be paid in advance, and in every case when it is based upon a percentage of the earnings or income

of the person, firm or corporation, the computation shall be made upon the earnings or income of said person, firm or corporation for the year immediately preceding the time the license is to be dated and is payable; or the person, firm or corporation to whom the license shall be granted shall at the end of the year pay the amount due for the excess over the estimate made at the time of the issuing of the license, under the same penalty as if the party had failed or refused to procure a license. Any person, firm or corporation violating any of the provisions of this ordinance shall be fined not less than five dollars nor more than one hundred dollars for each offense. Each day that the violation is continued shall constitute a separate offense."

Under this ordinance the appellants were required to pay, in August, 1894, to the appellee, \$498.35 for license, being the amount due under the ordinance on business from February 1, 1893, to February 1, 1894, and the further sum of \$607.48 in January, 1895, for license, being the amount due under the ordinance for business during the year 1894. To recover these two sums paid, this action was brought. It is alleged that the ordinance is void because of a want of power in the general council to pass such an ordinance, and because it is unjust and unequal taxation; that the property of appellant situate in the city of Louisville does not exceed \$1,000, and that it should not be compelled to pay taxes to appellee exceeding the rate on that amount of property.

To this petition and amendment a demurrer was sustained, and, declining to plead further, the petition was dismissed, and from that judgment this appeal is prosecuted.

Section 225 of the act for the government of cities of the first class, being section 3011 of the Kentucky Stat-

utes, provides: "The general council may, by ordinance, provide for the following licenses, to be paid into the sinking fund, with adequate penalties for doing business, for following the calling, occupation, profession, or using, or holding, or exhibiting the articles herein named without the required license: . . . Every life, fire or accident, casualty and indemnity insurance company, title company, title insurance company, or abstract company, doing business in this city, shall, on or before the first day of February of each year, pay to the sinking fund not less than two nor more than three dollars on every hundred dollars of premiums received on business done in the city during the previous year. . . ."

Thus, it appears that the ordinance of the general council was passed under the direct authority of the provision of the charter, *supra*. However, counsel for appellant contends that the charter provision is unconstitutional, as against section 174, and was not permitted to be exercised by section 181.

Section 174 of the Constitution provides: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the Constitution; and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchise."

Section 181 provides: ". . . And may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions."

We are of opinion that the ordinance imposing this tax



and the charter permitting the ordinance are constitutional and valid. They are not in conflict with, but in conformity to, the powers given by sections 174 and 181 of the Constitution.

In the case of Southern B. & L. Association v. Norman, 98 Ky., 294, [56 Am. St. Rep., 367; 32 S. W., 952], a case very similar to the one at bar, this court, per Mr. Justice Hazelrigg, held constitutional section 4228, Kentucky Statutes, imposing a license or franchise tax on foreign building and loan associations of \$2.00 on each \$100.00 of its gross receipts in this State; the court saying: "The associations of the kind described generally have no tangible property within the State, and we do not regard the purpose of the statute to be to force an artificial *situs* on the obligations due the association from its members for stock, dues, etc. . . . The business, nevertheless, is a valuable one, and it is for the privilege of doing this business that the tax is imposed. It is not a tax on the corporate franchise, for the conclusive reason that the State does not grant this; but it is a tax on the franchise of doing business in this State, and in this sense a franchise tax. It is true, the amount of the gross receipts of the company is taken as the measurement of the tax, but this is only the adoption of a fair and just standard. Such taxes may be measured by the dividends, by the amount of the capital stock, by the extent of the business transacted, by the net earnings, by the gross receipts," etc.

It is thus clear that the tax here levied is a tax on the right to do business in the city of Louisville, and is a franchise tax to that extent—a license tax. This taxation the Constitution, charter and ordinance provide may be collected. The demurrer to the petition was properly

sustained. There were other questions argued, but our conclusions render it unnecessary to discuss them.

Judgment affirmed.

CASE 22—HOMICIDE—MARCH 16.

Baker v. Commonwealth.

APPEAL FROM KNOX CIRCUIT COURT.

1. CRIMINAL LAW—EXCLUSION OF WITNESSES.—It is within the sound discretion of the trial court to permit a witness to remain in the court room although the witnesses have been excluded from the court room on the motion of defendant.
2. CRIMINAL LAW—EVIDENCE.—It is probably competent on a trial for homicide to show that the accused had been indicted at the instance of the deceased, as tending to show motive for the killing, but it is error to admit such evidence without instructing the jury that such evidence is competent to show motive only.
3. SAME.—It was error to permit the Commonwealth's Attorney to ask the defendant on cross-examination if he had not been indicted for offenses wholly unconnected with the crime for which he was being tried and not tending to show motive.
4. SAME.—It is not competent to ask a defendant questions whose only possible object is to excite in the minds of the jury a suspicion that he has been guilty of other offenses than the one for which he is being tried.
5. SAME.—It is competent to cross-examine a defendant by asking him with reference to transactions tending to disgrace him, but the period concerning which the inquiry is made should have borne some reasonable relation to the time at which the testimony is given and a period of fifteen years is too remote.
6. SAME—DYING DECLARATIONS.—It is the duty of the trial court before admitting statements as dying declarations to satisfy himself that such declarations were made when the deceased

106	212
110	110
110	308

106	212
122	506
124	372

106	212
132	52

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Baker v. Commonwealth.

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was under solemn sense of impending dissolution and in determining this preliminary question the intendments of law are in favor of the finding of the trial court, and this court will give some weight to the finding of the trial judge upon this question and will defer to his conclusion of fact where the testimony is contradictory.

7. SAME.—It is inadmissible to permit witnesses to state that the deceased said as a part of his dying declaration "I want all you people to swear the truth about this."
8. COMMONWEALTH'S ATTORNEY—DUTY OF.—The Commonwealth's Attorney is a *quasi* judicial officer and should aid the court in keeping from the jury all testimony which the court has ruled to be incompetent. He should present the Commonwealth's case fairly and should not press upon the jury any deductions from the evidence which are not strictly legitimate. His object, like that of the court, should be simply justice.

TINSLEY & FAULKNER FOR THE APPELLANT. (JOHN G. MATTHEWS AND J. SMITH HAYS OF COUNSEL.)

1. There is no exception to the rule as to separation of the witnesses where it is demanded by either party. One who is a prosecutor and also a witness should not be present where the other witnesses are testifying, especially when his presence would have the effect of intimidating witnesses. *Salisbury v. Com.*, 79 Ky., 425; *Walker v. Com.*, 8 Bush, 89.
2. Dying declarations must relate to the death of the deceased and the circumstances surrounding the death and *in extremis*. 9 Am. & Eng. Ency. of Law, 679: They must be made *in extremis* under a solemn sense of impending dissolution, when it is considered that the constant expectation of immediate death will *silence every motive to falsehood, remove every feeling of revenge* and the mind will be induced by the *most powerful considerations to adhere strictly to the truth*. *Walston v. Com.*, 16 B. M., 15; *Vaughan v. Com.*, 86 Ky., 434; *Mathedy v. Com.*, 14 Ky. Law Rep., 183; *Green v. Com.*, 13 Ky. Law Rep., 897; *Bates v. Com.*, 14 Ky. Law Rep., 187; *Luker v. Com.*, 9 Ky. Law Rep., 385; *Adwell v. Com.*, 17 B. M., 247.
3. A party who did not live over thirty minutes, who had been drinking, who was constantly saying until he died, "Maybe I ain't killed; maybe I'll get well; send for a doctor; send for my gun," and who went down to death cursing and calling on

## Baker v. Commonwealth.

- God to damn his soul, and breathing out threats against his enemy, whose statements are contradictory and untrue, was not in such frame of mind, nor so impressed with the solemnity of death as to give to his statements the sanctity of an oath. "I want all you people to swear the truth," was not such a statement, as related to the *death* or the manner of death of the party making it. Hence, it was error to admit it as a dying declaration. *Henderson v. Com.*, 5 Ky. Law Rep., 244; *Leiber v. Com.*, 9 Bush 13; *Collins v. Com.*, 12 Bush, 272.
4. Proof of other homicides or crimes than the one under trial is not admissible. 9 Am. & Eng. Ency. of Law, 690; *Martin v. Com.*, 93 Ky., 189; *Burdett v. Com.*, 93 Ky., 76; *Sayler v. Com.*, 17 Ky. Law Rep., 100; *Eversole v. Com.*, 16 Ky. Law Rep., 143; *Combs v. Com.*, 14 Ky. Law Rep., 704; *Spurlock v. Com.*, 14 Ky. Law Rep., 605.
  5. The defendant is subject to the same rule as other witnesses. *Sayler v. Com.*, 17 Ky. Law Rep., 100.
  6. He could not be asked if he had killed another man in same difficulty.
  7. Evidence that defendant said he had killed other men, or that he had committed other crimes than the one for which he was being tried are inadmissible as calculated to prejudice the jury against him. *Eversole v. Com.*, 16 Ky. Law Rep., 143; *Spurlock v. Com.*, 14 Ky. Law Rep., 605; *Combs v. Com.*, 14 Ky. Law Rep., 704.
  8. It was improper and highly prejudicial to permit proof that defendant had been indicted for other offenses and then to permit him to state that he did not commit those other offenses. *Roberts v. Com.*, 94 Ky., 499.
  9. It was error to refuse to withdraw the jury on motion of defendant, on account of the improper conduct of attorneys for Commonwealth in exhibiting before the jury two indictments against defendant for house-burning and barn-burning, over the objections of defendant. *Cook v. Com.*, 86 Ky., 664.
  10. It was error and highly prejudicial to permit the witness H. B. Howard to say that defendant had hired men to shoot him, at the same time his son was killed, and then refuse to permit defendant to state he did not do any of these things. *Roberts v. Com.*, 94 Ky., 499.
  11. Statements of defendant made within five minutes of the homicide and to the first person he met are part of the *res gestae*

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Baker v. Commonwealth.

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and should be admitted. *Shulds v. State*, 55 Ga., 696; *Harrison v. State*, 20 Texas Appeals, 387; *Little v. Com.*, 25 Gratt. (Va.), 921; *Galloway v. Com.*, 5 Ky. Law Rep., 219; *Fitzgerald v. Com.*, 9 Ky. Law Rep., 664.

12. But whether this be true or not, when it was shown by the Commonwealth that a few minutes after the killing Baker came back near where the deceased was, it was competent for him to explain his reasons why he went back there, and to refuse to permit him to so explain was highly prejudicial to him.

W. S. TAYLOR, ATTORNEY-GENERAL, FOR THE APPELLEE.

1. The question of excluding witnesses from the court-room is within the sound discretion of the court; and where the presence of a witness is necessary to enable a party to properly present his case the judge may permit such witness to remain in the court-room. *Johnson v. Clem*, 82 Ky., 84; *Walker v. Com.*, 8 Bush, 86.
2. The dying declarations were properly admitted. The proof shows clearly that the deceased was conscious of his impending dissolution. *State v. Smith*, 93 Iowa, 469; *Jordon v. State*, 82 Ala., 1.
3. It was not an abuse of discretion on the part of the trial court to permit the defendant to be cross-examined with reference to various indictments against him as tending to test his accuracy, veracity or credibility. 7 Am. & Eng. Ency. of Law, 109.

JAMES D. BLACK AND W. R. RAMSEY IN A SUPPLEMENTAL BRIEF FOR THE APPELLEE.

1. The misconduct of John G. White towards one of the attorneys for the appellant, referred to in the argument of this case, does not belong properly to the record and could not avail appellant for a reversal, because even if it were in the record such misconduct did not occur in the presence of the court or the jury.
2. The court properly instructed the jury on the law of the case.
3. The statement of Tom Baker after he had left the scene of the tragedy and had gone 150 or 200 yards away, was not a part of the *res gestae* and was properly refused by the court.
4. Decedent's declarations need not be under the conviction of impending death in order to make them competent. 10 Am. & Eng. Ency. of Law (2d ed.), 368; *Idem*, 362-3; 1 Greenleaf on Evidence (13th ed.), 156; *Same* (15th ed.), 226, note E. Pub-

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Baker v. Commonwealth.

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the necessity is the true grounds for admitting dying declarations. 1 Greenleaf on Ev., 156, note 2; Lieber v. Com., 9 Bush, 13, 14; Collins v. Com., 12 Bush, 272; Luker v. Com., 5 S. W. R., 354.

5. The condition of declarant's mind as to his approaching death must be determined from all that was said and done and all the circumstances of the case. 10 Am. & Eng. Ency. of Law, *supra*; Polly v. Com., 15 Ky. Law Rep., 502; McHargess v. Com., 15 Ky. Law Rep., 323; Com. v. Matthews, 89 Ky., 292; Young v. Com., 6 Bush, 312.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

Having been convicted and sent to the penitentiary for life, under an indictment for the murder of W. L. White, Thomas Baker has prosecuted this appeal.

The indictment was found by the grand jury of Clay county, and removed to Knox county for trial, on account of the state of lawlessness existing in the county where found.

The evidence tends to show that appellant and his brother, D. Baker, belonged to a faction which was at feud with another faction to which the deceased, White, belonged. On the day of the killing, they had gone out for the purpose, it is claimed, of seeing G. D. Murray, to whom appellant owed some money; met Murray in the road, and turned back with him in the direction of their home. The Bakers were on foot, and armed with guns and pistols, which is explained by the fact that their father had been shot a short time before by one James Howard, who lived in the neighborhood, and who, as they had been informed, had made threats against their lives. There is also evidence showing that White, the deceased, had repeatedly threatened appellant's life.

Murray, who was on horseback, was some forty yards in advance of the Bakers, when they met deceased. Murray

spoke to White, who was also on horseback, and White said "Good evening," without looking at him, and, as Murray states, with a peculiar expression on his face. At about the time White met the Bakers, Murray states that he looked 'round—which was natural, as he knew the men were enemies—and saw White jerk his horse with his left hand, facing appellant, and draw his arm around, when appellant raised his gun quickly, and fired. At that time Murray's horse threw him, but without injury to him, as he lighted on his feet. He states that neither Tom nor D. Baker went any nearer to White, but came on to where Murray was, and went with him to his father's house. Murray saw no pistol in White's hand, either when they passed in the road or at the time of the shooting, but states that the road was very dusty, and the rays of the evening sun were full in his eyes as he looked back. Murray states that immediately at the shooting White fell from his horse, and Tom Baker loaded his gun before coming on to where Murray was.

The Bakers both state that White drew a pistol from his left side, and was presenting it at appellant, when the latter, with one hand, suddenly raised his gun, and, without taking aim, fired, and White fell to the ground; that neither of them went near him, but that they went on down the road and left him there, and did not see his pistol after they saw it in his hand at the moment of the shooting.

This pistol was found by Reese Murray—the first person to come to White after the shooting—lying in the dust of the road, with the appearance of having been crawled over. Though a double-action pistol, it was cocked when found.

The evidence tends to show that White was a very reckless man when in drink; that he had been drink-

ing that day, and had in his saddle-bags a broken bottle, which had contained whisky; that he was angry with appellant, and had made threats against his life.

A number of witnesses testified as to the declarations concerning the shooting, made by the deceased, who lived only about a half hour after the shooting.

At the trial, upon demand of appellant, the witnesses were put under rule. The commonwealth requested that John G. White, a brother of the deceased—who had been summoned as a witness for appellant—be excepted from the rule; appellant's objection to this being overruled by the court, Baker filed an affidavit stating that John G. White was his most bitter enemy; had taken a very active part in bringing a large number of partisans of the White-Howard faction in Clay county to Barboursville; that attempts had been made to intimidate appellant's witnesses; and that, if White were permitted to remain in the court room, he believed his witnesses would be intimidated. White made affidavit denying any attempt to intimidate any witness, and stating that he had no personal knowledge of the facts attending the killing of his brother, and that he believed the purpose of summoning him as a witness for the defense was to exclude him from the courtroom and prevent him from informing the attorneys for the Commonwealth as to the evidence in the case, with which he had acquainted himself.

By section 601 of the Civil Code it is provided: "If either party require it, the judge may exclude from the court room any witness of the adverse party not at the time under examination, so that he may not hear the testimony of the other witnesses." By section 151 of the Criminal Code it is provided that the provisions of the



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Baker v. Commonwealth.

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Civil Code "shall apply to and govern the summoning and coercing the attendance of witnesses, and compelling them to testify in all prosecutions, criminal or penal actions or proceedings," etc.

Section 601 of the Civil Code has, therefore, been held to apply to a proceeding to disbar an attorney (*Walker v. Com.*, 8 Bush, 96), and to trials for felony (*Salisbury v. Com.*, 79 Ky., 432). But in *Johnson v. Clem.*, 82 Ky., 87, it was said that: "If this provision (Civ. Code Prac., section 601) is to be regarded as mandatory, it would produce much inconvenience in the practice, and often obstruct the proper administration of justice. . . . It will also often occur in the practice that the presence of a witness familiar with the history of the case becomes indispensable by reason of the unavoidable absence of the litigant, and therefore the necessity of placing that construction on the statute must conduce to a just and proper practice by leaving the question as to the exclusion of the witnesses to the exercise of a sound judicial discretion."

We conclude, therefore, that, even if John G. White had been summoned as a witness for the defense, in good faith, the court did not err in permitting him to remain in the court room during the trial for the purpose of informing the attorneys for the Commonwealth as to the evidence the witnesses would give.

It is also urged as error that on the cross-examination of appellant the Commonwealth was permitted, against objection, to prove by him that he was under indictment for felony, viz., house burning and burning a store house. The two indictments were offered in evidence to the jury, and appellant was asked questions whose object was to show that the deceased had been instrumental in insti-

tuting the prosecution. He was also asked, against objection, whether he had been indicted for anything else. He was also asked what that indictment was for, and the court excluded the answer to the latter question from the jury, but allowed the answer that he had been indicted to remain. The court also permitted him to be interrogated as to whether he did not go to New York, fifteen or sixteen years before the trial, for the purpose of getting counterfeit money.

It was probably competent, as showing a motive for the killing, to show that he had been indicted at the instance of deceased.

As said by Judge Lewis in the opinion in *Martin v. Com.*, 93 Ky., 193, [19 S. W., 580]:

"Motive may be shown in certain cases by a state of facts conducing to make out another and distinct offense from that for which the accused is being tried. . . . Such evidence goes to the jury as a matter of necessity, for the purpose alone of showing motive on the part of the accused to commit the crime, and no more than is necessary to show motive should be allowed, and then the jury told the purpose for which the evidence is to be considered by them. *Com-mander v. State*, 60 Ala., 1; *Pinckord v. State*, 13 Tex., App., 478."

It does not appear in this record that the jury were informed of the purpose for which alone the testimony as to the indictments was to be considered, and this appears to us to be prejudicial error. He was being tried for two offenses. The fact that a grand jury had indicted him for burning a dwelling and a storehouse was used to fix upon him the crime of murder.

As said by Judge Lewis in the *Martin* case, *supra*: "This

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Baker v. Commonwealth.

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character of evidence is likely to be wrongfully considered by a jury, and made to constitute a part of the offense for which the party is being tried, as it might well be argued that one so depraved as to commit the crime of robbery would not hesitate to commit murder."

We think it was also error to permit appellant to be asked as to other indictments, there being no pretext that this testimony was introduced for the purpose of showing motive. This question appears to have been directly decided in *Leslie v. Com.*, 19 Ky. L. R., 1202, [42 S. W., 1095], where it was held error to ask the defendant if he had not been arrested and tried for carrying concealed weapons, and if he had not been arrested for discharging firearms in a town. As said in that case:

"But in the case at bar the question asked could only be admissible as tending to show appellant's guilt of particular wrongful acts, and therefore within the inhibition of section 597 of the Civil Code, which provides that a witness may not be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of a witness or record of a judgment that he has been convicted of felony."

In *Saylor v. Com.*, 17 Ky. L. R., 103, [30 S. W., 391], it was said by Judge Paynter, delivering the opinion of the court: "Under the bill of rights, he can not be compelled to give evidence against himself; but when he becomes a witness for himself in a criminal prosecution, he waives that right, so far as the charge under investigation is concerned. The fact that he does so waive it does not give the Commonwealth the right to compel him to admit the commission of other offenses, which would subject him to punishment, presentment or infamy."

Nor is it competent to ask a defendant questions whose only possible object is to excite in the minds of the jury a suspicion that he has been guilty of other offenses than the one for which he is being tried.

Nor do we think it was competent to interrogate appellant in regard to a transaction which took place more than fifteen years before, when he was a very young man.

It is true, as indicated in the Saylor case, *supra*, and a number of other cases, that when a defendant in a criminal prosecution voluntarily goes upon the witness stand in his own behalf, he is subject to cross-examination, like any other witness; and in cross-examination directed to the object of shaking his credit by injuring his character he may be compelled to answer questions irrelevant to the facts in issue, though the answers be disgraceful to him. But we do not understand that the entire past lives of witnesses are liable to be ransacked and exposed, and the whole history of their lives laid bare. We are of opinion that the period concerning which the inquiry is made should bear some reasonable relation to the time at which the testimony is given, and that a period of fifteen years is too remote, though we should be reluctant to grant a reversal for such an error alone.

Another objection, very earnestly urged by counsel for appellant, is that the declarations made by deceased just prior to his death, were incompetent, and also that, if competent as to the fact of the killing and the attendant circumstances, portions of the statement were allowed to go to the jury which should have been excluded, and were highly prejudicial.

The evidence tends to show that at the time of making the statements, deceased was in a high state of excitement from anger or drink, or possibly

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Baker v. Commonwealth.

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both. He had been shot in the stomach. The nature of the wound was such as to indicate a fatal result. He was not removed from the roadside, where he lay when the witnesses reached him. The evidence is that he said Tom Baker shot him; shot him for nothing. He told them not to move him; to let him die there; that Baker shot him and never spoke to him. One of the witnesses asked him if he drew his pistol. He said he did not.

The court excluded the statement that Baker shot him for nothing.

Another witness says that he asked White how bad he was hurt, and he said he was killed, and said Tom Baker shot him. The witness asked him if he could do anything for him, and White said if he could get a doctor, maybe he could do something for him. He told witness to tell his wife to come, and told them to bring his gun, and said, "Maybe I am not killed, and, if not, I will be God damned if I——," when one of the women stopped him and told him not to talk that way. White said, "They have my pistol;" and, again, "No; it is in my left hip pocket." Most of these statements appear to have been, from time to time, repeated, during the twenty or thirty minutes that he lived after the shooting. Some of the witnesses were permitted to state, against objection, that White said, "I want all you people to swear the truth about this."

In support of the contention by appellant that all the statements made by White should be excluded as not competent on the ground of being dying declarations, it is urged that the state of mind in which he was, and especially his expressed desire for a doctor, and his reiterated statement that maybe he was not killed, his revengeful feeling as expressed in the threat as to what

he would do in case of recovery, precluded the possibility of the statements made being within the rule as stated in *Walston v. Com.*, 16 B. Mon., 15, that, to be admissible, "these declarations must be made *in extremis*, under a solemn sense of impending dissolution, when it is considered that the constant expectation of immediate death will silence every motive for falsehood, remove every feeling of revenge, and the mind will be induced by the most powerful considerations to adhere strictly to the truth."

There is considerable authority in support of the proposition that calling for a doctor indicates that the statements were not made under a sense of impending dissolution, and that it must appear that they were made when every hope of this world was gone. *Wyatt v. Com.*, 8 Ky. L. R., 55, [1 S. W., 196]; *Bates v. Com.*, 14 Ky. L. R., 177, [19 S. W., 928]; *Mathedy v. Com.*, 14 Ky. L. R., 182, [19 S. W., 977].

And see 1 Greenl. Ev., sections 156-158.

On the other hand, it was held in *Green v. Com.*, 13 Ky. L. R., 897, [18 S. W., 515], that the character of the wound and the attending circumstances may be sufficient to show that the declarant had no hope of recovery.

It may be possible that we should have reached a different conclusion from the trial court as to the admissibility of these statements of the deceased as dying declarations, but it was necessary for the judge of that court to first determine a question of fact, viz., whether, at the time the declarations were made, they were made under a sense of impending dissolution, and when all hope of this world was gone, before he could decide the legal question of their admissibility. The question of fact is bound up in, and is a part of, the question of law. We should therefore give some weight to the finding of the trial judge upon this

question, as he heard the witnesses testify, and was, perhaps, in a better position to estimate the value of their testimony, where contradictory, than this court can be from the bald record of the words they used; and, as the question in the case at bar seems to us to be a close one, we are not inclined to disturb his ruling upon this point.

But it was clearly inadmissible to permit witnesses to state that he said, "I want all you people to swear the truth about this." That statement is admissible for consideration by the court as perhaps tending in some measure to show a consciousness of impending death, in determining the admissibility of statements as to the fact of killing and the attendant circumstances; but it was not competent to go to the jury, and was prejudicial, because it had a tendency to unduly impress them with the weight to be accorded to this exceedingly dangerous kind of testimony.

In Rice on Criminal Evidence, section 330, it is said:

"This species of evidence is obviously liable to great abuse, and should be received with great caution, and only when a proper introduction entitles it to be received. The witness whose testimony is cast upon the record is beyond the reach of cross-examination; all opportunity for investigating the question of malice, enmity, positive identification, is lost forever; and the accused, whose tenure of life is hanging in the balance, has to contend with the additional disadvantage that a just indignation is aroused in the minds of the triors by the mere recital of a hideous crime. Evidence of this character is universally admitted, however, on the ground of necessity; and, in order to prevent the entire frustration of justice, to impart competency to this evidence it must clearly appear that the declarant was conscious of the imminence of death; believed himself to

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Baker v. Commonwealth.

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be beyond the probabilities of recovery; and this belief must be evident by some word or act of a conclusive and unmistakable character."

All the statements of the declarant were admissible before the court, to enable it to determine whether any of those statements were admissible to the jury as dying declarations. All which did not relate distinctly and pertinently to the facts of the killing and the attendant circumstances, should have been rigidly excluded. And to this end it would have been eminently proper to have excluded the jury while the preliminary examination to determine the admissibility of the statements was had, in which case the witnesses should have been cautioned not to state the inadmissible declarations, and counsel for the Commonwealth should not have asked questions in any way calculated to bring out the incompetent statements.

We do not wish to do injustice to counsel for the Commonwealth, but some of the interrogatories propounded to witnesses, after the statement that Baker shot him for nothing had been excluded, seem to have been—though, perhaps, not so intended—admirably adapted to draw out testimony as to that declaration from subsequent witnesses. Counsel for the Commonwealth should aid the court in keeping from the jury all testimony which the court has ruled to be incompetent, for, though testimony which reaches the jury be excluded by direction of the court, the impression, especially if the statement is often repeated, is likely to remain on the minds of the jury. The duty of a Commonwealth's attorney has been well stated by Chief Justice Paxton of Pennsylvania in *Com. v. Nicely*, 30 Pa. St., 261, [18 Atl., 737]:

"It is difficult to measure the amount of zeal which is al-



lowable, or, at least, excusable, on the part of counsel engaged in the defense of a man who is upon trial for his life. Writers upon professional ethics differ upon this subject, and I will not discuss it. We have no difficulty, however, in measuring the extent of zeal which counsel for the Commonwealth may properly display upon such occasions. The district attorney is a *quasi* judicial officer. He represents the Commonwealth, and the Commonwealth demands no victims. It seeks justice only—equal and impartial justice—and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence he should act impartially. He should present the Commonwealth's case fairly, and should not press upon the jury any deductions from the evidence that are not strictly legitimate. When he exceeds this limit, and in hot zeal seeks to influence them by appealing to their prejudices, he is no longer an impartial officer, but becomes a heated partisan. When that officer allows private counsel to assist him in the trial of a cause, such counsel represents him to that extent, and should be governed by the same rules of propriety."

And in *Hurd v. People*, 25 Mich., 405, it was said by Chief Justice Christiancy: "His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And, however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet justice so attained is unjust, and dangerous to the whole community."

See, also, *Curtis v. State*, 6 Cold., 11, and *State v. Sanford*, 1 Nott & McC., 512.

For the reasons stated, the judgment is reversed, and

Schauf's Admr. v. City of Paducah.

cause remanded, with directions to set aside the judgment, and award appellant a new trial, and for further proceedings consistent with this opinion.

CASE 23—ACTION FOR NEGLIGENCE CAUSING DEATH—  
MARCH 17.

Schauf's Administrator v. City of Paducah.

APPEAL FROM M'CRACKEN CIRCUIT COURT.

NEGLIGENCE—EXPOSED POND.—A municipality is not liable for damages caused by the death of a child seven years old who entered an undisclosed lot of the city and waded out beyond his depth into a pond in pursuit of a bird and was thus drowned.

THOMAS E. MOSS FOR THE APPELLANT.

A municipal corporation with control of public common traversed by foot-paths on which the public may rightfully travel is liable to a common law action for damages caused by a dangerous and unguarded excavation made by the corporation for its own purposes in the ground adjoining one of the paths to a person walking thereon and who was at the time using due care. Dillon's Munic. Corps. (3d ed.), 2 vol., sec. 985; Weet v. Rockport, 16 N. Y., 161; City of Pekin v. McMahon, 154 Ill., 141; 45 Am. St. Rep., 114; 11 Am. Railroad & Corp. Reps., 278; Shearman & Redf. on Neg. (4th ed.), sec. 705; — Am. & Eng. Ency. of Law, 53; 1 Thompson on Negligence, 304; Railroad Co. v. Stout, 17 Wallace, 657; Keffe v. Milwaukee, &c., Ry. Co., 21 Minn., 207; Kansas Cent. Ry. v. Fitzsimmons, 22 Kan., 686; 31 Am. Rep., 203; Koons v. St. Louis, &c., R. R. Co., 65 Mo., 592; Ferguson v. Columbus City Ry. Co., 75 Ga., 637 and 77 Ga., 102; Mackey v. City of Vicksburg, 64 Miss., 777; Bird v. Gardner, 50 Am. Dec., 261; Taylor v. Norwich, &c., R. R. Co., 68 Am. Dec., 513; Bransom v. Labrot, 81 Ky., 638; Powers v. Harlow, 51 Am. Rep., 154; Hydraulic Works Co. v. Orr, 33 Pa. St., 332; Ziglor's Exr. v. Robinson, 12 Ky. Law Rep., 558; L. & N. R. R. Co. v. Graves, 78 Ky., 74; Kerr v. Forgue, 54 Ill., 483; Chicago City Ry. Co. v. Wilcox, 138 Ill.,

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Schauf's Admr. v. City of Paducah.

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370; 2 Thompson on Neg., 1181, 2; Rirg v. Gardner, 19 Conn., 507; Daley v. Norwich, &c., R. R. Co., 26 Conn., 591; 68 Am. Dec., 413; Union Stock Yards, &c., Co. v. Rourk, 10 Ill. App., 474; Evanish v. G. C. & S. T. Ry. Co., 57 Tex., 123; Dowling v. Allen, 88 Mo., 293.

**L. D. HUSBANDS FOR THE APPELLEE, CITY OF PADUCAH.**

The owner of land might have upon it a pond of water unfenced, deep enough to drown people without incurring any liability, if any person goes upon his land and is drowned in the pond, unless the pond be in such proximity to a public street or road where the public have the right to travel, and a traveller is passing on the edge of the highway without contributory negligence falls in the pond or well, as the case may be and is drowned. *Louisville & Portland Canal Co. v. Murphy's Admr.*, 9 Bush, 525, and cases cited; *Clark v. Foot*, 8 Johns., 421; *Livingston v. Adams*, 8 Cow., 175; *Ratcliffe's Exrs. v. Mayor of Brooklyn*, 4 Comst., 195; 1 *Hillyard on Torts*, 125; 16 *Am. & Eng. Ency. of Law*, bottom of page, 413; 45 *Am. Rep.*, 266; s. c. 160 *Penn. Rep.*, —; 2 *Thompson on Neg.*, 1123-45-6-7; 39 *Am. Reps.*, 261, 436; 47 *Am. Rep.*, 446; 36 *Am. Rep.*, 376.

**JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

Some years ago the city of Paducah bought a piece of land outside of the city limits, from which it got gravel; from the gravel being removed, a considerable excavation was made, which in the course of time filled with water, and was used as a bathing and fishing place. After this the limits of the city were extended so as to include this pond, which stood out in the commons, and some distance from any highway. Appellant lived in the city about a mile from the pond. His little son, seven years of age, went down to visit a relative, living not far from it. While crossing the common the boy caught a bird, and, seeing some children fishing at the pond, he went over to where they were fishing. The bird got away from him, and fluttered out on the water. The child waded in after the

bird. It fluttered out further from him on the water. He, following it, got in over his depth, and was drowned, there being no one present large enough to pull him out. For this, appellant, as administrator of the child, brought suit against the city, alleging that the death of the child was due to its negligence. At the conclusion of the evidence for appellant the court instructed the jury peremptorily to find for the appellee.

Appellant relies on *Bransom's Adm'r v. Labrot*, 81 Ky., 638, [50 Am. Rep., 193], as sustaining a recovery in this case. In that case children were allowed to play about a pile of lumber insecurely placed, which, for this reason, fell on a child and killed it. The court likened the case to that of a man setting a trap upon his premises, and it was on this ground that the judgment was rested. But accumulations of water are common about all cities, especially river towns. A large part of the farm houses of this State have ponds about them. The city was under the same obligation as any other lot owner, and no more. The child did not lose his life from the dangerous proximity of the pond to a highway, or from any secret danger, such as a great depth of water near the bank, but from his voluntarily wading out in the pond some ten feet after the bird. It was not the duty of the city to provide against such a contingency as this.

In *Gillespie v. McGowan*, 45 Am. Rep., 365, a boy eight years old, while fishing in a well in an old brickyard, fell in and was drowned—a stronger case for the plaintiff than we have here—yet it was held that there could be no recovery. The court said:

"We are unable to see anything in this case, to charge the defendants with negligence in not inclosing their lot or guarding the well. There was

no concealed trap or dead-fall, as in *Hydraulic Co. v. Orr*, 2 Norris, 332. The well was open and visible to the eye. No one was likely to walk into it by day, and this accident did not occur at night. A boy playing upon its edge might fall in, just as he might in any pond or stream of water. In this respect the well was no more dangerous than the river front on both sides of the city, where boys of all ages congregate in large numbers for fishing and other amusements. Vacant brickyards and open lots exist on all sides of the city. There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds, and level the surface, so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may fall from its branches. Yet the principle contended for by plaintiff would bring us to this absurdity if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." To the same effect, see 2 *Shearman & Redfield on Negligence*, section 715; *Bishop on Noncontract Law*, sections 845, 854, and cases cited.

Judgment affirmed.

CASE 34—ACTION TO FORECLOSE MORTGAGE—MARCH 17.

**Kentucky Trust Company, Trustee v. Third  
National Bank of Louisville, Etc.**

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

**CONTRACTS—PUBLIC POLICY—AGREEMENT FOR ATTORNEY'S FEE.**—A stipulation in a mortgage to a trustee to secure bondholders, for a reasonable attorney's fee to the trustee and compensation to the trustee, if the lien should be enforced is against public policy and void.

FONTAINE T. FOX FOR THE APPELLANT.

The agreement by the obligor, embraced in this deed of trust for the appellant of a reasonable attorney's fee and compensation to the trustee, is neither usurious nor against public policy. *Newport & Cin. Br. Co. v. Douglass, &c.*, 12 Bush, 721; *Clark v. Anderson*, 13 Bush, 116; *Lawson's Rights, &c.*, vol. 5, secs. 2448, 2458, 2392, 2447; *Idem*, vol. 4, sec. 2032; *Flint on Trusts & Trustees*, sec. 342; *Witherspoon v. Musselman*, 14 Bush, 214; *Greenhood on Public Policy*, p. 21; 18 Ohio St., 190, 204; *Perley on Interest*, p. 207.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

On December 27, 1895, John E. Carpenter executed to appellant a deed of mortgage as trustee for the bondholders to secure bonds to the amount of \$5,000. It was stipulated in the mortgage that in case of the sale of the property under the lien retained in it, appellant should pay out of the proceeds all such sums as it might have been necessary to pay counsel in that behalf, and a reasonable compensation for its services as trustee. On April 22, 1897, appellant filed suit as trustee to foreclose the mortgage, making defendants to the petition the mortgagor and the appellee and others who were subsequent lienholders.

The case being prepared for trial, the court gave judgment for the foreclosure of the mortgage lien, but declined to allow anything to appellant for its counsel's fee in the action, or its own services as trustee in bringing the suit; and of this it now complains by this appeal.

It is well settled in this State that a stipulation in contract that the obligor will pay the obligee's attorney's fees in case the suit is brought upon it is contrary to the policy of our laws, and not enforceable. *Thomasson v. Townsend*, 10 Bush, 114; *Gaar, &c. v. Louisville Banking Co.*, 11 Bush, 180, [21 Am. Rep., 209]; *Rilling v. Thompson*, 12 Bush, 310; *Witherspoon v. Musselman*, 14 Bush, 214, [29 Am. Rep., 404]; *Pryse v. The People's Building, Loan and Savings Association*, 19 Ky. L. R., 752, [41 S. W. 574].

It is insisted by counsel that this rule is unsound, and should not be adhered to; but we think it has been so long settled that the question is no longer open. It is also insisted that the rule should not apply to a suit by a trustee to foreclose a mortgage given to secure the holders of the bonds therein provided for.

We can not see that the intervention of a trustee changes the legal effect of the transaction. The trustee is permitted to sue in his own name; but the bondholders also have a right to sue, and we think the rule should be the same when the suit is brought by the trustee as when it is brought by the bondholders. A distinction, if made, would simply destroy the rule altogether; for, if it were allowed, trustees would be named in all cases, in order to secure the payment of the attorney's fee. The trustee is entitled to his counsel fee necessarily expended in the execution of his trust out of the trust fund; and this charge should be paid here out of the money adjudged the trustee by the judg-

Hackworth v. Louisville Artificial Stone Co. Same v. O'Leary.

ment complained of. The attorney has a lien on the judgment for his reasonable fee. While in name the attorney of the trustee, he is really the attorney of the bondholders represented by it, and his lien can not be extended beyond the recovery in the action. The intervention of a trustee appears to have been resorted to largely to avoid the rule forbidding the payment of attorney's fees out of the mortgaged property on foreclosure over and above the debt secured by the mortgage; and whether intended for this purpose or not, we do not think it should be allowed to have this effect. It does not appear that the trustee did anything but allow the use of its name as plaintiff in this action, which might have been brought equally as well in the name of the bondholders themselves.

Judgment affirmed.

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CASE 25—STREET ASSESSMENTS.—MARCH 17.

Hackworth v. Louisville Artificial Stone Co.  
Same v. O'Leary.

APPEAL FROM SHELBY CIRCUIT COURT.

1. MUNICIPAL CORPORATIONS—CITIES OF FOURTH CLASS—STREET IMPROVEMENTS.—An ordinance for reconstructing side-walks which provides that the improvement shall be "constructed by putting in five-inch stone curbing in pieces not less than two feet long and two feet wide, the side-walk to be ten feet wide, exclusive of curbing, to be made of granitoid," is sufficiently specific.
2. SAME.—Cities of the fourth class have power to have side-walks constructed and reconstructed at the expense of the abutting lot owner.



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Hackworth v. Louisville Artificial Stone Co. Same v. O'Leary.

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3. **SAME—LIFE TENANT AND REMAINDERMAN.**—The cost of the reconstruction of a worn-out side-walk is not to be apportioned between a tenant by the courtesy and the remainderman, but the entire cost is to be borne by the former.
4. **SAME—DAMAGE BY CHANGE OF GRADE.**—The evidence fails to show any change of grade and resulting damage to the lot owner.

**G. G. GILBERT FOR THE APPELLANT.**

Counsel contended that the judgment below must be reversed:

1. Because the city pretended by its notice to afford appellant an opportunity to build the pavement himself, and yet denies him that opportunity by failing to have any plans or specifications by which he could do the work.

2. The ordinance is void because it did not fix the grade of the street or pavement.

3. Because there is no allegation or proof that the ordinance was ever published as required by the charter.

4. Because the entire burden of this improvement is placed upon the life tenant, and none of it upon the estate in remainder.

5. Because the mayor in the terms of the advertisement and letting departed from the terms prescribed in the terms of the ordinance.

6. Because by the terms of the charter, public ways are to be reconstructed at the cost of the city. Ky. Stats., sec. 3565. And public ways are defined to include side-walks by the charter, Ky. Stats., sec. 3560.

7. The ordinance requiring this pavement to be built also required the owners to be notified. The owners in this case, Hackworth's children, were not notified at all.

8. The grade of the street and pavement were materially changed without any authority of the city.

9. The contract was let, to put in new curbstones and the price of new curbstones was charged, and yet the contractor, O'Leary merely repaired the old curbing.

Citations: Hydes, &c., v. Joyes, 4 Bush, 464; Ky. Stats., secs. 3565, 3560, 3563, 3487; Presbyterian Church v. Fithian, &c., 16 Ky. Law Rep., 581; Daviess v. Myers, 13 B. Mon., 511; City of Henderson v. Lambert, 14 Bush, 28; McGraw v. City of Marion, 17 Ky Law Rep., 1255; Fehler v. Gosnell, 18 Ky. Law Rep., 239.

Hackworth v. Louisville Artificial Stone Co. Same v. O'Leary.

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**L. C. WILLIS FOR THE APPELLEE.**

1. The city has the right and authority to order side-walks constructed or reconstructed and fix the cost thereof upon the abutting lot owners. *Loesser v. Redd*, 14 Bush, 18; *Starling v. City of Hopkinsville*, 12 Ky. Law Rep., 558; *Droege v. Woods*, 14 Ky. Law Rep., 431; *Purdy v. Drake*, 17 Ky. Law Rep., 819; *Board of Councilmen of Frankfort v. Murray*, 18 Ky. Law Rep., 279; Ky. Stats., secs. 3565, 3566, 3560.
2. The specifications of the pavement were sufficiently definite. The term "granitoid" has a fixed and definite meaning, which any man with ordinary intelligence could ascertain. *Board of Councilmen of Frankfort v. Murray*, 18 Ky. Law Rep., 279; 24 Am. & Ency. of Law, 58, citing *State v. New Brunswick*, 30 N. J. L., 395; and note to page 59, citing *Adams v. Quincy*, 130 Ill., 560; and note to page 60, citing *Harney v. Heller*, 47 Cal., 15. A life tenant should bear the burden of reconstruction in a case like this. *Dillon on Mun. Corps.*, sec. 798; 24 Am. & Eng. Ency. of Law, 72, citing *Keller v. Stanley*, 86 Ky., 242.
3. The question whether the work was necessary or not, or whether it was properly done or not, was a question for the city council to determine. *Town of West Covington v. Schultz*, 16 Ky Law Rep., 331; *Purdy v. Drake*, 17 Ky. Law Rep., 819.
4. The grade was not changed.

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

The facts being substantially the same in these two cases, by consent of parties they are heard together. Both are suits upon apportionment warrants issued to appellees by the city council of Shelbyville for the cost of curbing and sidewalk in front of a lot owned by appellant, constructed under a contract with the city made pursuant to an ordinance, regularly approved, authorizing the letting of the work.

Appellant resists payment on several grounds. The city council adopted an ordinance requiring appellant and other owners of certain described property within a specified time to construct sidewalks and curbing of a particular description in front of their respective lots.

The ordinance setting out the work to be done says: "Said sidewalk is to be constructed by putting in 5-inch stone curbing, in pieces not less than two feet long and two feet wide; the sidewalk to be ten feet wide, exclusive of curbing, and to be made of granitoid."

There was no attempt to change or alter the grade of the street. The ordinance was simply requiring the property holders to reconstruct their pavements, and seems to us to be sufficiently specific and definite. The testimony shows that "granitoid" is a peculiar character of pavement, which is sufficiently indicated by its name.

Section 3569, Kentucky Statutes, provides that "in all actions to enforce liens, as authorized by this act, a copy of the ordinance authorizing the improvement or work, a copy of the contract therefor, and a copy of the apportionment, each attested by the clerk of the board of councilmen, shall be *prima facie* evidence of the due passage and approval of the contract, and of every other fact necessary to be established by the plaintiff in such action to entitle him to the relief authorized to be given in this act."

The testimony shows that the ordinance requiring the pavement to be built was published in a newspaper for the time required by the charter. There can be no question that the city authorities have the right to order sidewalks constructed or reconstructed, and to require payment therefor from the abutting lot-owners. See section 3566, Kentucky Statutes; *Loeser v. Redd*, 14 Bush, 18; *Purdy v. Drake*, 17 Ky. L. R., 819, [32 S. W., 939]; and *Board of Councilmen of Frankfort v. Murray*, 99 Ky., 422, [36 S. W., 180].

Another alleged error relied on is that the judgment for the whole of the cost of the improvement is against the interest of the life tenant.

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Hackworth v. Louisville Artificial Stone Co. Same v. O'Leary.

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Defendant, as tenant by the curtesy, has possession and is in the enjoyment of all the rents and profits accruing from the buildings on these lots, and while the rule is well settled that the burden of paying for the improvement of a street by original construction, which adds permanently to the value of abutting lots, must be apportioned between the estate of the life tenant and the remainder-man, we are of the opinion that the work sued for in this action is not the character of work to which this principle applies. The old pavement had been worn out by long use, and defendant was required to pay only for putting down a new one. The improvement was more in the nature of a repair, like putting on a roof, or doing any act which is necessary to preserve the property and prevent its decay. A good pavement in front of a business house is as essential to its use and enjoyment as that the building should be kept painted and under roof. The cost of the repair seems to be reasonable, and we are of the opinion that it should be paid for by the life tenant.

The proof fails to support the contention of appellant that he has suffered injury as a result of changing the grade in constructing the new pavement. In fact, the proof is conclusive that there has been no change in the grade, so far as the curbing is concerned. The only change was to reduce the slant along a portion of the pavement so as to make it level, and in conformity with the remainder of the sidewalk. For the reasons indicated the judgment is affirmed.

## CASE 26—ACTION TO ENFORCE MORTGAGE—MARCH 18.

## Creech, Etc. v. Abner, Etc.

106 239  
117 61

## APPEAL FROM LEE CIRCUIT COURT.

106 239  
121 292

1. **PLEADING—PETITION IN ACTION TO ENFORCE MORTGAGE.**—In an action to enforce a mortgage debt, the petition must state specifically the promise to pay on the part of the defendant, an acceptance of the mortgage on the part of the plaintiff, and the failure on the part of the defendant to pay the mortgage debt. A petition which lacks these substantive averments is fatally defective.
2. **ADVERSE POSSESSION.**—As long as the vendee looks to his vendor for a title, his possession is not adverse to the vendor and he can not avail himself of such possession to prove his title.
3. **SAME—EVIDENCE.**—In an action to foreclose a mortgage against defendant whose title is by adverse possession, evidence that the defendant held under a title bond from his vendor and claimed the land as owner, is incompetent to establish a title by adverse possession.

**T. C. JOHNSON FOR THE APPELLANTS.**

1. The right of appellees to enforcement of a lien against the land depends upon their right to recover their debt of E. G. Creech and as against Creech the petition is fatally defective, first, in failing to allege any promise to pay, or, second, any contract from which a promise may be implied. *Moxley's Admr. v. Moxley* 2 Met., 309; *Howard v. Chiles*, 8 B. M., 377. Further, it is not alleged that E. G. Creech failed to pay the debt sued on. An allegation that E. G. Creech is indebted to the plaintiff is insufficient to supply the omitted averments. *Drake v. Semonin*, 82 Ky., 291; *Huffaker v. National Bank of Monticello*, 12 Bush, 287; *Corbin v. Oldham*, 1 Ky. Law Rep., 327. The failure to set out the undertakings of Creech is fatally defective. *Murphy v. Estis*, 6 Bush, 532; *Mann v. Martin*, 82 Ky., 242; *Hill v. Barnett*, 14 B. M., 67; *Collins v. Blackburn*, same, 203; *Montjoy's Admr. v. Pierce, &c.*, 4 Met., 97; *Riggs, &c., v. Motley & Co.*, 2 Ky. Law Rep., 88; *Moxley's Admr. v. Moxley*, *supra*; *Miles v. Miller*,

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Creech, &c., v. Abner, &c.

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12 Ky. Law Rep., 134; *Campbell v. Galbraith*, same, 459; *Hufaker v. National Bank of Monticello*, *supra*; *Green v. Page*, 80 Ky., 368. The petition further fails to allege a signing or delivery of the writing.

2. The possession of the vendee under an executory contract is, in contemplation of law, the possession of the vendor. *Butts v. Chinn*, 4 J. J. Mar., 64; *Spriggs v. Allen*, 6 J. J. Mar., 158; *Hill v. Picketts' Admr.*, 91 Ky., 644.
3. It is not claimed by appellees that they advanced their money without notice of appellants' rights, nor can they do so if the mortgagee holds by contract only and not by deed. *Boone v. Chiles*, 10 Pet., 177. The appellees could not maintain a right to recover on their mortgage against E. G. Creech unless Creech himself could enforce his contract against his vendor; and this, under the authority of *Usher v. Floyd*, 83 Ky., 552, he could not do. *White v. O'Banion*, 86 Ky., 93; *Newberger v. Adams*, 92 Ky., 26; Ky. Stats., sec. 2351; *Hill v. Picketts' Admr.*, 91 Ky., 644; and this, by virtue of the fact that the contract between E. G. Creech's vendor and himself was not in writing.

#### H. L. WHEELER FOR THE APPELLEES.

Parsons had knowledge of the mortgage to the appellees before her contract with Creech and at the time the mortgage from E. G. Creech was executed he was in possession of the land and had been living on it for more than twenty years with a claim of title. This constitutes title on the part of E. G. Creech and his mortgagee took an equity superior to that of Parsons who took with knowledge of the claim of the appellees. *Com. v. Gibson*, 85 Ky., 656; *Wells' Hrs. v. Head*, 2 B. M., 166.

#### JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

The appellees instituted suit in the Lee circuit court, seeking to obtain a judgment against E. G. Creech for the sum of \$360, and also claimed a lien, and sought the enforcement of the same, upon a tract of land alleged to have been mortgaged or conveyed to the said Abners to secure the debt aforesaid. The appellants, Enoch Creech and Emily Parsons, were also made parties to the suit, it being alleged in the petition that Parsons asserted

some sort of fictitious claim upon the land, and that appellant Enoch Creech held the legal title to the land.

It is substantially averred in the petition that appellant Enoch Creech, on the —— day of ——, 18—, sold, and by title bond conveyed, to E. G. Creech the said tract of land, and at the time of said sale from Enoch to E. G. Creech he (Enoch) delivered the possession of said land to E. G. Creech, and that all the purchase money had been paid. It was also claimed by appellees that they were entitled to have said Enoch Creech convey the land to E. G. Creech, and asked that he be adjudged to do so.

The appellant Parsons filed a demurrer to the petition, which was overruled by the court, to which ruling the appellant excepted. The substance of the answer of appellant Parsons is a denial that the Abners had any lien upon the land mentioned for the payment of their said alleged debt, or any part of said debt, and also a denial of a sale of the land by Enoch Creech to E. G. Creech, or the execution of any writing by Enoch Creech to E. G. Creech requiring him to convey the land to E. G. Creech. It is also alleged in the answer that appellant Parsons had purchased the land from E. G. Creech, and was in the actual occupancy of same at the time of the execution of the alleged mortgage, and that she had continuously lived on same for more than four years last past. It is also claimed that she owes the defendant Enoch Creech some unpaid purchase money on his said land, which he is to convey to her by good and sufficient deed when she pays to him the unpaid purchase price of said land. In conclusion she prays that plaintiff's petition be dismissed, and that said alleged mortgage be adjudged null and void, and that she have judgment for her costs, etc.

The reply is a substantial traverse of all the affirma-

tive allegations of the answer of Parsons tending to show any right in her to hold the land, or any adverse possession thereof, at or prior to the execution of the mortgage. It is further averred in the reply that at the time of the execution of said mortgage by E. G. Creech he was living on said land, and in the actual possession of same; that he had purchased said land from his co-defendant, Enoch Creech, and had paid all the purchase money therefor, and was by Enoch Creech placed in the actual possession of said land, and had been in the actual possession as the owner of said land for more than twenty years before the execution of said mortgage; and that appellant Parsons had at all times recognized the mortgage of plaintiffs, and that it was her intention to pay off said mortgage as soon as she collected some money of one Lunsford.

Enoch Creech also filed his answer, in which he denied that plaintiffs had any lien under or by virtue of their alleged mortgage, and denied plaintiffs' right to have their alleged debt against the defendant E. G. Creech, or mortgage, adjudged a lien on said land, or any part of it, and denied that he ever sold the land in controversy to E. G. Creech, or ever executed any writing to that effect. The substance of his answer is that he had made a conditional verbal trade with E. G. Creech, by which, if E. G. Creech paid certain sums of money to him, he would sell the land to E. G. Creech; but he alleged that no such payment was ever made.

The plaintiffs, in their reply to the answer of Enoch Creech, denied that he only allowed and permitted his brother, E. G. Creech, to live on said land as tenant, or that he only allowed him to use and occupy said land. It is further alleged that at the time that Enoch Creech sold the land to his brother, E. G.



Creech, that he (Enoch) received some of the purchase money thereon, and put the said E. G. Creech in possession of said land, and that he (E. G. Creech) lived thereon from the ——— day of ———, 18—, up to the time of the execution of said mortgage, and afterwards until he sold or entered into some sort of arrangement with his co-defendant Parsons; that said E. G. Creech owned, claimed, and had possession of said land from the date of his purchase, claiming the same to a well-defined marked line and natural boundary, against the defendant Enoch Creech and all the world; that his possession, claim, and ownership of said land were open, notorious, and adverse to the defendant Enoch Creech and all the world; that he owned, claimed, occupied, and exercised actual ownership over said land to a well-defined boundary for more than twenty years before the filing of this action. It is further alleged, in substance, that Enoch Creech had all the time given it out publicly and privately that E. G. Creech was the owner of the land.

The rejoinders of the appellants may be taken as a traverse of all the material averments of the replies. The appellants, it seems, also excepted to the depositions of William Abner, John Abner, O. H. Davis, and Taylor McGuire, taken on the 13th of August, 1894. It does not, however, appear that the court ever acted upon the exceptions filed.

The court, upon final hearing, rendered a judgment against E. G. Creech for the sum claimed to be due the Abners, and also adjudged to them a lien upon the land described to satisfy the judgment, and adjudged a sale thereof; and it appears that the land has been sold, and exceptions filed to the report of sale, but it does not appear that the court ever passed upon the exceptions.

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Creech, &c., v. Abner, &c.

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It will be observed that E. G. Creech made no defense, nor has he given his deposition in the case. It is insisted for appellants that unless the plaintiffs (now appellees) show a right to recover judgment against E. G. Creech, and a lien upon the land in controversy, that they were not entitled to any judgment in this action, and that appellants can avail themselves of any defense that E. G. Creech might have made; and it seems that this contention is tenable. It is further insisted that the petition is fatally defective, in that it fails to allege any promise to pay, nor does it set out any breach from which any promise can be inferred; that there is no evidence filed with the petition of indebtedness. It will be seen from the petition that, although it avers an indebtedness, and that E. G. Creech borrowed the money from the plaintiffs, and executed a deed or mortgage; yet it is nowhere expressly averred that E. G. Creech ever promised to pay to plaintiffs any sum of money, nor is it expressly alleged that plaintiffs accepted the deed or mortgage. It will be seen from the so-called "mortgage" that if E. G. Creech, on a certain day,—21st of April, 1891,—paid to plaintiffs the \$360, the deed should become null and void, and there is no express averment that he failed to do so.

It is true that the petition says that the debt is due and unpaid. The answers filed do not cure the defect in the petition, and it seems to us that the petition failed to show a cause of action. See *Moxley's Adm'r v. Moxley*, 2 Metc. (Ky.) 309; *Cloud v. Clinkinbeard*, 8 B. Mon. 397; (48 Am. Dec., 400), *Huffaker v. Bank*, 12 Bush, 287; *Murphy v. Estes*, 6 Bush, 532; 14 B. Mon. 67, 203; *Mountjoy's Adm'r v. Pearce*, 4 Metc. (Ky.) 97.

It will be further seen that the petition shows the legal title to be in Enoch Creech, but it seems that the cause was

finally prepared and decided upon the assumption and idea that E. G. Creech had verbally purchased the land from Enoch Creech, and paid for the same, and had held it adversely for more than fifteen years prior to the institution of this suit, and in fact prior to the execution of the so-called "mortgage." It may be conceded that the evidence upon the part of plaintiffs tends to sustain the contention of plaintiffs that such purchase, payment, and holding had actually existed; but it may be well doubted whether, under the petition, such proof ought to have been admitted. It seems to us that the allegations in the reply and the proof introduced was, to say the least of it, in conflict.

It is a well-settled rule of law that, as long as the vendee looks to his vendor for title, his possession is not adverse, and that he can not avail himself of possession under such a contract to prove his title. A parol contract for the sale of land is not enforceable, and the vendee acquires no title whatever to the land by virtue of such sale; but all the modern decisions of this court sustain the doctrine that a party may, by parol, purchase land, and enter upon the same, and he may then openly and notoriously hold, claim, and occupy the same adverse to all the world, and that such adverse holding and occupancy will ripen into a perfect title within fifteen years, unless the statute is suspended or extended on account of the disabilities of the holder of the legal title. In other words, when the vendee has so held during the statutory period necessary to vest in him the independent title to real estate, that his title will in like manner become perfect, although he first entered under a parol contract.

Taking the pleadings and proof into consideration in this case, we are of opinion that the petition did not show a right to recover judgment against

Spicer, &c., v. Seale.

E. G. Creech, nor a right to a lien upon the land in controversy for the payment of any such judgment; nor do we think the pleadings in this case authorized the plaintiffs to rely upon and prove adverse possession of E. G. Creech in order to show title in him to the land in controversy. But upon the return of this cause the plaintiffs, as well as the defendants, may be allowed to amend their pleadings, if they so desire. For the reasons indicated, the judgment appealed from is reversed, and cause remanded for proceedings consistent herewith.

CASE 27—ACTION TO CANCEL DEED AND RECOVER LAND—  
MARCH 18.

Spicer, Etc. v. Seale.

APPEAL FROM OWSLEY CIRCUIT COURT.

JUDICIAL SALE—UNDER ERRONEOUS JUDGMENT.—A purchaser of land from defendant in an action in which the land is attached as a provisional remedy, takes title subject to the attachment lien. Upon his death this title descends to his heirs, and the plaintiff in the attachment action having acquired title to the land to satisfy a judgment claim which was ultimately determined to be invalid, the heirs of the purchaser from the defendant are entitled to a cancellation of the commissioner's deed to the plaintiff and to the recovery of the net rents.

JAMES M. SEBASTIAN FOR THE APPELLANTS.

1. The appellee Seale by the attachment against Chambers did not acquire any greater interest in the land in contest than the defendant Chambers, at the time the attachment issued, and was placed in the hands of the sheriff, had. That interest was only an equity. The plaintiffs who were in possession with a title to the land not from G. D. Chambers only but from Pleasant Wilson, the title-holder, were not before the court when the order

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Spicer, &c., v. Seale.

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of sale was made in June, 1879—their ancestor G. W. Spicer having departed this life while living on the land on the 30th of August, 1877.

2. It was fraud in Seale to attempt to have a judgment executed pending a decision of the Court of Appeals.
3. The plaintiff's petition was good as originally drawn; it was good as amended, and good reformed.
4. The title required by Seale was acquired under a judgment for a claim which was ultimately held to be invalid. So far, therefore, as predicated rights was concerned, the judgment was a void judgment and no title could be acquired under it. *Green v. Breckinridge*, 4 Mon., 545; *Jones v. Commercial Bank*, 88 Ky., 642; *Denham v. Anderson*, 14 Ky. Law Rep., 391; *Feltman v. Butts*, 8 Bush, 115; *Simpson v. Hawkins, &c.*, 1 Dana, 115; *Bright v. Banks*, 6 Mon., 205; *Rily v. Rily*, 3 Dana, 79; *Sutton v. Pollard*, 16 Ky. Law Rep., 685; *Brown v. Vancleave*, 14 Ky. Law Rep., 392; *Baker v. Baker*, 87 Ky., 461; *Yocum v. Foreman*, 14 Bush, 494; *Burrell's Law Dict.*, subject "*pendente lite*."

C. P. CHENAULT ON THE SAME SIDE.

The commissioner's deed under which Seale held was executed without any consideration whatever. *Baker v. Baker*, 87 Ky., 461.

E. E. HOGG AND ROBT. RIDDLE FOR THE APPELLEE.

Counsel stated the position of the appellant as follows: "First, the position of appellees is that the granting a new trial destroys the effect of the sale under the original judgment; second, that legal title was not in G. D. Chambers and consequently the attachment created no lien." Both of these contentions were combated by counsel upon the authority of *Yocum v. Foreman*, 14 Bush, 494.

It was further contended that G. W. Spicer was a purchaser *pendente lite*.

Citations: 5 Mon., 445; 5 J. J. Mar., 638; 10 B. Mon., 446; 8 B. Mon., 102; 18 B. Mon., 230; 2 Met., 550; 4 Dana, 438; 12 B. Mon., 472.

E. E. HOGG AND RIDDLE & RIDDLE IN A PETITION FOR A REHEARING.

The appellants' ancestor, Spicer, having purchased pending the litigation, stood precisely in the attitude of Chambers, and according to the unbroken rule of property in Kentucky, Chambers himself could not have recovered this land.

JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

In 1863 appellee, J. W. Seale, sued one Chambers in the Owsley circuit court for damages, claiming \$2,000. To secure any judgment, as well as to obtain jurisdiction, an attachment was obtained and levied on a tract of land in Owsley county. After the levy of this attachment, and before a trial of any kind was had of the action, G. W. Spicer, ancestor of these appellants, bought the land, and took a deed of general warranty from Chambers and one Wilson. Chambers entered his appearance to the action of Seale, and controverted the grounds of attachment. A demurrer to the petition was sustained, and the action was dismissed, and attachment discharged. Seale prosecuted an appeal to this court, and reversed the judgment sustaining the demurrer, and the cause was remanded for trial. A change of venue was taken, and the case sent to Wolfe county for trial. In this county a trial was had in the absence of Chambers, and a judgment was rendered in favor of Seale for \$1,500; and the attachment was sustained, and a decree of sale rendered, directing a sale of the land to satisfy the judgment. Chambers prosecuted an appeal from that judgment and decree of sale to this court. On that appeal this court affirmed the personal judgment, but reversed the decree of sale on account of the description of the land being defective. Pending that appeal, Chambers brought an action for new trial, alleging unavoidable casualty that prevented him from being present at the trial. On the affirmance of the personal judgment, as above, the lower court dismissed this action by Chambers for new trial, and corrected the decree of sale of the land to conform to the opinion of this court.

From the judgment dismissing the petition of Chambers for a new trial, he appealed to this court; and that judg-

ment was reversed, and the cause remanded for a new trial of the original action of Seale, wherein he obtained the judgment of \$1,500. Pending this appeal by Chambers, the land was sold under the judgment and decree of Seale, and at that sale appellee, Seale, became the purchaser at the price of \$705, much less than his judgment debt. This sale was confirmed to Seale, and deed was made to him. This deed of the commissioner bears date December 24, 1879. Upon the return of the case, after a second change of venue to Breathitt county, a trial of the original case of Seale against Chambers resulted in a verdict and judgment for defendant, Chambers. Seale prosecuted an appeal to the Superior Court, and that court, in April, 1887, affirmed that judgment in favor of Chambers. So that it finally was adjudged that Seale had no cause of action against Chambers.

Some time in 1880 or 1881, appellee, Seale, under a writ of possession, was placed in possession of the land, and has remained in possession ever since. In 1891 the appellants the heirs at law of G. W. Spicer, brought this action in equity, seeking to have the deed to appellee, Seale, made by the commissioner under the decree, set aside, and the land adjudged to them, and that they recover damages for its detention.

Appellee, for defense, relied on the regularity and conclusiveness of the judgment, decree, and deed to him, and limitation. It is not contended that appellee, Seale, has ever paid anything for the land, as the judgment and decree under which he bought was in his favor, and was reversed and set aside.

Upon trial of this action, the court below denied the relief sought and dismissed appellant's petition absolutely, and hence this appeal.

It is clear that the defendant in the old action, Chambers had a right to sell the land and pass title subject to the attachment lien of the appellee, Seale. This he did to Spicer, ancestor of these appellants. It is also clear that Spicer was a *lis pendens* purchaser, and was bound by the judgment in that action, although not a party. It appears that Spicer died in 1877, some time before the sale by the commissioner, when appellee purchased; and the action was not revived against these appellants, Spicer's heirs, nor were they made parties by amendment. This land descended to these appellants subject to the lien for the claim of appellee, Seale, against Chambers. In the case of *Baker v. Baker*, 87 Ky. 461, [9 S. W. 382], this court said: "In that case (*Yocum v. Foreman*, 14 Bush, 494) the property sold under the erroneous judgment belonged to the defendant, and alleged debtor to the plaintiff; and, in stating the rule, it was limited in its application to title acquired under a judicial sale as against a defendant. But it was not then decided, nor do we think any consideration of policy would require or justify courts in holding purchases of property belonging to another than the judgment debtor as valid when the judgment has been reversed; and the plaintiff and purchaser finally adjudged to be the debtor, instead of creditor. . . . He instituted the actions to recover on a debt it had been adjudged was not in whole or in part due him. The two tracts of land are in his possession by a purchase at a sale erroneously made to satisfy the unfounded claim; and to permit him to hold and enjoy them, to the injury of the rightful owners, who are not in fault, is not required by sound policy, or sanctioned by justice."

So, in this case it seems to us that the principles of equity and common justice would mean nothing, and courts of law be a farce, if there could be no relief granted here.



If appellants are denied relief, it would amount to confiscation of their property, not only without the forms of law, but against the law itself, which finally adjudged that appellee, Seale, had no lien, but that the land belonged to Chambers when sold to appellants' ancestors free of lien.

The plea of limitation is not available, for the action was brought within five years after the final determination of the action of Seale against Chambers; and appellants were bound by the judgment in that case, and their cause of action to cancel the deed did not accrue till that case was finally determined, which was in April, 1887.

By the authority of *Baker v. Baker*, *supra*, it is clear that appellee, Seale, can not hold the land. The judgment of the lower court was therefore erroneous in denying appellants relief.

There is no theory of the law, and certainly none in equity, that would authorize appellee to hold the land and also the purchase price bid by him. However, appellants elected to sue for the land; and it appears from the proof that the land was never worth exceeding \$500, and it would be inequitable to require appellee to pay his bid and its accrued interest for this land, when he bid more than it was really worth.

There was proof taken as to the value of the land and the annual rental value; and we conclude from the proof that a very low estimate would be \$25 a year, this amount to be net, after the improvements and taxes are deducted. The court should, we are of opinion, have canceled the deed, restored the land to appellants, and awarded rents at the rate of \$25 per annum from the year 1886, as all prior to that are barred by limitations.

For the reasons indicated, the judgment is reversed, and

Stone, Auditor, v. Wickliffe.

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cause remanded, with directions to the lower court to render judgment canceling the deed, awarding possession of the land to appellants, and for \$300 rents, with no deductions for improvements made or taxes paid, and for proceedings consistent herewith.

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CASE 28—ACTION FOR MANDAMUS—MARCH 18.

Stone, Auditor v. Wickliffe.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. **REWARDS—SUFFICIENCY OF PETITION.**—A petition for a mandamus against the Auditor to require him to issue his warrant for a reward offered by the Governor for the arrest and conviction of a felon, which alleges that the plaintiff ascertained that the defendant was guilty, swore out a warrant for his arrest, delivered it to the sheriff and assisted in arresting the defendant and delivering him to the jailer, can not be held insufficient merely because the jailer's receipt filed with the petition recites that the defendant was delivered to him by the sheriff "and W. A. Wickliffe was with him at the time." Such a recital is not a contradiction of the averment.
2. **SAME—CONVICTION.**—A conviction under section 1932, Kentucky Statutes, providing for rewards for the arrest and conviction of felons means a final conviction and can not be held to have been had while an appeal is pending to reverse the judgment of conviction.

**W. S. TAYLOR, ATTORNEY-GENERAL AND M. H. THATCHER IN  
A BRIEF AND SUPPLEMENTAL BRIEF FOR THE APPELLANT.**

1. The record shows that the arrest of Franklin was made by the sheriff of Marshall county and not by the appellee.
2. The receipt of the jailer for the prisoner is not certified by the circuit court as required by the Statute to authorize its payment.
3. A conviction under section 1932, Kentucky Statutes, means a final

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Stone, Auditor, v. Wickliffe.

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conviction and can not be said to have been had as long as the appeal is pending from a judgment of conviction.

4. The proceeding was in legal effect one against the Commonwealth and no judgment for costs could be rendered against Stone, Auditor.

Citations; *Smitha v. Gentry*, 20 Ky. Law Rep., 171; Ky. Stats., secs. 344, 885.

IRA JULIAN FOR THE APPELLEE.

1. When a reward is offered by the Governor for apprehension and conviction of a criminal the proper procedure of a citizen (in attempting to procure said arrest and conviction) is to cause a warrant to be sworn out, put it in the hands of the sheriff or peace officer and assist in arresting and delivering the criminal to the jailer, and the sheriff's action does not prevent recovery of the reward by the citizen.
2. If the approval and certification of the jailer's receipt for prisoner, when a reward for his apprehension and conviction has been offered, were necessary to authorize payment of the reward (which we deny), still the petition herein states a good cause of action for mandamus against the Auditor in this case. Ky. Stats., sec. 344; Civil Code, sec. 134; *Posey v. Green*, 78 Ky., 162; *Green v. Page*, 80 Ky., 370; *Coffey v. Com.*, 18 Ky. Law Rep., 646. But we insist that section 344 Kentucky Statutes does not apply to proof of a claim for reward for the apprehension and conviction of a criminal; and the proper and sufficient proof of this character of reward is a verified account, allowed, recorded and certified to the Auditor for payment by the circuit court.
3. When a reward has been offered for apprehension and conviction and a citizen has procured the arrest and verdict of guilty and judgment thereon, the prosecution of an appeal to the Court of Appeals from the judgment of conviction, or reversal of said judgment, does not preclude the citizen procuring the arrest and conviction from collecting his reward. *Blackstone's Com.*, vol. 4, p. 362; *Com. v. Gorham*, 99 Mass., 420; *Com. v. Lockwood* (Va.), 25 Gratt., 850; *State v. Alexander*, 79 N. C., 231; *U. S. v. Watkins* (Ore.), 6 Fed. Rep., 152; *York, &c., v. Dalhouson*, 45 Penn. St., 372; *Ex parte Brown*, 68 Cal., 178; *Bishop's Stat. Crimes*, sec. 348; *Jacob's Law Dict.*, 163; *People v. Goldstein*, 32 Cal., 433; 1 *Bishop's Crim. Law*, sec. 963; 2 *Bishop's Crim. Law*, sec. 903.

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Stone, Auditor, v. Wickliffe.

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4. Judgment for costs should be rendered against the Auditor personally when he wrongfully refuses to do a plain duty and is ordered to do so by a writ of mandamus. *In re Ayres*, 123 U. S., 443; *Gates v. Barrett*, 79 Ky., 295; Ky. Stats., secs. 885-889.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

A reward of \$400 having been offered by the Governor of Kentucky for the apprehension of the unknown person or persons guilty of the murder of Daisy Sullivan, in Marshall county, "and their delivery to the jailer of Marshall county, and conviction of said crime," appellee, Wickliffe, obtained a warrant of arrest for one Noah Franklin, delivered it to the sheriff, accompanied him, and assisted him in arresting Franklin, and in person accompanied the sheriff in charge of the prisoner to the jail of Marshall county, where he was delivered to the jailer, the jailer's receipt reciting that the body of Franklin was delivered to him by the sheriff, in company with appellee. Afterwards appellee caused witnesses for the Commonwealth to be summoned before the grand jury. An indictment was returned against Franklin, and a trial had, at which appellee co-operated with the Commonwealth's attorney in the prosecution of the charge, and which resulted in a verdict of guilty, fixing the punishment at imprisonment for life; and a judgment was thereupon rendered sentencing the prisoner. The account against the Commonwealth for the amount of the reward was approved and allowed by the circuit court, and ordered to be certified to the Auditor for payment; but, that officer refusing payment, appellee instituted this proceeding for a mandamus, to compel the issuance of a warrant on the Treasurer.

A demurrer to the petition was properly overruled, the objection urged on behalf of the Auditor that the petition shows the arrest to have been made by the sheriff being, as

we think, not well taken; for, if the averments of the petition are true that appellee ascertained that Franklin was the murderer of Daisy Sullivan, swore out the warrant, delivered it to the sheriff, ascertained Franklin's whereabouts, and assisted in his arrest and delivery to the jailer, he was entitled to the reward, provided the remaining prerequisite to the earning of the reward, viz., the conviction of the prisoner, within the meaning of the proclamation, had taken place. To entitle himself to the reward, so far as the arrest was concerned, it was not essential that appellee should personally and alone make the arrest; but he was entitled to the assistance of the arresting officers of the county, and to have a *posse comitatus* summoned, if necessary to the capture of the culprit. The essential fact in this behalf is the causing of the arrest.

It is not necessary to consider the second objection urged in appellant's brief, as that appears to have been abandoned.

Another objection made is that the receipt of the jailer filed as an exhibit recited that "the custody of him (Franklin) was delivered to me as jailer of Marshall county, charged with the murder of Daisy Sullivan, by the sheriff of Marshall county, J. H. Little, and W. A. Wickliffe was with him at the time" that this exhibit contradicted the averment of the petition that appellee delivered Franklin to the jailer, and that the exhibit controls the averment of the petition, and destroys its effect, so that it must be read as if the averment was not there. Without going into the question whether the doctrine announced in *Green v. Page*, 80 Ky. 370, was intended to apply to a case where there was direct contradiction between the exhibit and the allegation of the pleading, it is sufficient to say that the question which was there actually decided is exactly par-

allel to the question presented in the case at bar; i. e., that where the exhibit did not show all the facts necessary to support the averment of the pleading, but, on the other hand, did not directly contradict those averments, the pleading was not thereby rendered demurrable.

An answer was filed, alleging that, within the period allowed by law, Franklin had appealed from the judgment against him and that appeal was then pending in this court, and that appellee was not entitled to the reward, and the circuit court had no jurisdiction to allow it, until the case was finally determined. To this answer a demurrer was sustained, and the Auditor has brought the case here for review.

The reward appears to have been offered under section 1932, Ky. St. The Governor inserted in his proclamation a provision for the conviction of the guilty person or persons—a matter not provided for in the statute. But as appellee assumed to act under this proclamation, and is here claiming the reward in virtue of it, he can not complain of its insertion. Moreover, in a case like this, where the reward offered was for the apprehension of an *unknown* guilty person, it would seem essential that the guilt should be shown by a judgment of conviction before the reward could be considered earned.

A large number of authorities and definitions from the text-books are cited as showing that a verdict of guilty by a jury is, in many States, held to be a conviction, and a verdict of guilty followed by a sentence is everywhere so considered. In none of these cases, however, with three exceptions, does the question of a reward for conviction arise. Some of the text-writers cited, in defining conviction, were speaking of a time when there was no appeal in criminal cases. In some cases the question was whether a

defendant was convicted, after verdict and before sentence, in meaning of a constitutional provision forbidding a pardon before conviction. Some presented the question whether an elector was deprived of his franchise by a jury finding him guilty of a felony, and other like questions.

In *Wilmoth v. Hensel*, 151 Pa. St., 200, [25 Atl., 86], a reward had been offered for the prosecution and conviction of persons guilty of bribery and corruption at elections. The claimant of the reward had instituted a prosecution, and a plea of guilty had been entered. The court suspended sentence, and claimant was held to be entitled to the reward. This was proper. The claimant had performed all the service required of him, and further proceedings had been prevented by the action of the court, over which he had no control. The case had reached a conclusion "within the meaning of the defendant's offer." So, in *Buckley v. Schwartz*, 83 Wis. 304, [53 N. W. 511], the question was presented of a personal contract for the arrest and conviction, *in the circuit court*, of a person guilty of setting fire to certain buildings. A verdict of guilty was obtained; and, though the court arrested judgment, the claimant was held to be entitled under his contract for securing a conviction *in the circuit court*, as, under a somewhat peculiar ruling of the Wisconsin courts, an arrest of judgment does not operate to set aside the verdict. "The verdict remains and is available to the accused in a second prosecution for the same offense, under the plea of *autrefois convict*. The question is not an open one in this court."

In *Louisville & Nashville Railroad Co. v. Goodnight*, 10 Bush, 553, (19 Am. R., 80) a band of armed men having thrown a train from the company's track, and robbed the passengers, the company offered a reward

of \$1,000 for the capture and conviction of each of the parties to the offense, and \$10,000 for the capture and conviction of all the offenders. The appellees in that case captured and delivered to the authorities two men who, it was conceded, were engaged in the train robbery, who were indicted, and each in open court repeatedly confessed his guilt. Through the efforts of the company's attorneys, with a view to using the two men as witnesses against the others implicated in the train robbery; the cases against them were dismissed; and it was held that the captors were entitled to the reward, for, "if the happening of the event upon which their right to the reward depended was hindered or prevented by the act of the company, such hindrance was, in law, equivalent to the completion of the condition precedent, and the railroad company is liable on its contracts to pay the reward, although it may have acted in the matter with the utmost good faith."

It is manifest that none of these cases reaches the question presented by the case, at bar. The proclamation of the Governor, accepted and acted upon by appellee, constitutes the contract under which relief is here sought. In order to ascertain the meaning of this contract, the object of the proclamation should be first considered. That object was the punishment of the murderer—not merely that a trial should be had for the offense which had been committed, but that he should be actually punished. Now, if we construe this contract to refer only to the obtention of a verdict of guilty, subject to be set aside as the result of appeal to this court, the object of the contract may be entirely frustrated, for, upon a new trial being granted, appellee would be under no obligation, and would have no motive, to co-operate with the Commonwealth's attorney, to aid in securing witnesses for the prosecution, or in obtain-



ing evidence of the prisoner's guilt. And this very case presents an apt illustration of this, for, while it does not appear in this record, counsel for each side has stated in argument that this case has already been reversed by this court, and remanded for new trial. Assuming this to appear, Franklin is, under section 270 of the Criminal Code (Com. v. Arnold, 83 Ky. 1), "in the same position as if no trial had been had." The judgment of conviction is suspended by the appeal. Cr. Code, sec. 336. The object of the proclamation—that is, the punishment of the guilty person—is plain to any one who considers its language. It is equally plain that that object is not attained where, as in this case, an appeal has, within the period allowed by law, been taken to this court, and the conviction relied upon is liable to become a nullity. We think appellee was bound by what appears to us to be the plain intent and meaning of the proclamation, viz., that the reward was not to be paid until a final conviction. We do not mean that, if the Commonwealth took steps which would prevent appellee from completing his title to the reward—as by pardon, which directly implies an admission of guilt, or by *nolle prosequi*, after admission of guilty—appellee would not be entitled to the reward; but that, so long as the question whether he shall be or remain convicted is still in litigation, appellee is not so entitled.

In this view of the case, the question of costs as against the Auditor is not necessary to be considered.

Wherefore the judgment is reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

The whole court sitting.

LIQUIDATION OF BUILDING AND LOAN ASSOCIATION—MARCH 18.

**Sumrall, Etc. v. Commercial Building Trust's Assignee, Etc.**

OPINION FROM JEFFERSON CIRCUIT COURT, COMMON PLEAS DIVISION.

**BUILDING AND LOAN ASSOCIATIONS—LIQUIDATION—COMMON AND PREFERRED STOCK.**—In the liquidation of the affairs of an insolvent building and loan association the preferred stock is not entitled to preference over the common stock in the distribution of assets in the absence of an express provision of the charter to that effect, the preference being limited to dividends alone in a going concern.

**CARUTH, CHATTERSON & BLITZ FOR THE APPELLANT. (SUMRALL & SUMRALL OF COUNSEL.)**

1. Appellee corporation was organized under the present constitution, but prior to the passage of the corporation act of 1893, nearly all of the fully paid-up preferred stock now in existence being issued since the passage of said corporation act. Said corporation act provides that when preferred stock is issued by a corporation, it shall, on the dissolution, either voluntarily or involuntarily, be entitled to be redeemed at par before any distribution of the assets to the common stockholders. Ky. Stats., sec. 564.
2. The legislature reserved the right to alter, amend or repeal chapter 56 of the General Statutes, under which the corporation was organized. Genl. Stats., chap. 56; *Dusenbury v. Looks* (Mich.), 69 N. W., 929; *Sherman v. Smith*, 1 Black. (U. S.), 587.
3. The corporation act went into effect at once as to all matters not inconsistent with its provisions—and all acts of the corporation not inconsistent with those provisions were and are acts done under and by authority of said act. Ky. Stats., sec. 573.
4. The fully paid-up preferred stock was issued under the authority of the charter and by-laws, and in accordance with section 564, Kentucky Statutes, was paid for in cash and at par, and repre-

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Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

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sented by the officers, agents and common stockholders of the corporation, to be preferred above the common stock, and that the common stock fund was held sacred for the maturity and repayment of the preferred.

5. It is an inherent power in a corporation to issue preferred stock subject to such restrictions as are imposed by statute, and these restrictions have been complied with in this fully paid-up preferred stock issue. *Kent v. Quicksilver Mining Co.*, 78 N. Y., 159; *McGregor v. Home Ins. Co.*, 33 N. J. Eq., 181-186.
6. The statute prefers this stock as to the capital or assets, as well as to dividends or interest. *Ky. Stats.*, sec. 564; *Cook on Corp.*, 1 vol., sec. 278; *McGregor v. Home Ins. Co.*, 33 N. J. Eq., 181; *Hamlin v. Cont. Trust Co.*, 78 Fed. Rep., 664.
7. This court has recognized the right of a building and loan association to issue preferred stock, and enforce contracts in relation thereto. *Tate v. Lou. B. & L. Assn.*, 19 Ky. Law Rep., 1962.
8. The law as to estoppel and acquiescence also applies under the pleadings. *Herman on Estoppel*, vol. 2, pp. 1396-1399; vol. 1, pp., 709-11; *Maxville, Willisburgh & Lou. T. Co. v. Barnes*, 14 Ky. L. R., 431.
9. The court erred in sustaining the demurrer and dismissing answer and cross-petition.

SAME COUNSEL IN A SUPPLEMENTAL BRIEF FOR THE APPELLANT, SUMRALL. (WATTS & WATTS OF COUNSEL.)

1. The issue and sale of paid-up preferred stock is common to business corporations. *Safety Bldg. & L. Co. v. Ecklar*, opinion March 11, 1899.
2. The issue of paid-up and preferred stock by a building and loan association is "*ultra vires*." *Safety Bldg. & L. Assn. v. Ecklar*, *supra*.
3. The obligation which appellants purchased, being void and non-enforceable, the consideration for the payment therefor has wholly failed, and appellants are creditors of the association and entitled to recover back the moneys so paid; and to an accounting and restitution. *Thompson on Corporations*, vol. 2, sec. 984; *Anthony v. Household Sew. M. Co.*, 16 R. I., 571; s. c. 5 L. R. A., 575; *Louisiana v. Wood*, 102 U. S., 294; *Brown v. Atchison*, 39 Kan., 37 (17 Pac. Rep., 465); *Parkersburg v. Brown*, 106 U. S., 487-503; *Chapman v. Douglas Co.*, 107 U. S., 348-359; *Pul. Pal. Car Co. v. Cent. Trans. Co.*, 171 U. S., 138;

Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

Manville v. Belden Min. Co., 17 Fed. Rep., 425; Paul v. Kenosha, 22 Wis., 266; Newcastle North. R. Co. v. Simpson, 23 Fed. Rep., 214; Moore v. Swanton Tanning Co., 15 Atl. Rep., 114; Ford & Warren v. Leatherer, 4 Bibb., 512.

WILLIAM J. WATTS FOR APPELLANTS WILLIAMSON, &c. (JOSEPH S. BOTTS, W. W. & J. R. WATTS OF COUNSEL.)

1. The contract. White v. Boreing, 20 Ky. Law Rep., 210; Kent v. Quicksilver Mining Co., 78 N. Y., 159; Holyoke B. & L. A. v. Lewis, 27 Pac. Rep., 872; Bergman v. Assn., 27 Minn., 275; McKenna v. Diamond State Loan Assn., 18 Atl. Rep., 905; Pioneer Savings & Loan Co. v. Brockett, 58 Ill., 204; Englehardt v. Fifth Ward Permanent Dime Savings & L. Assn., 143 N. Y., 281; Thompson on Bldg. Assns., 31; Thompson's Com. on Corps., sec. 940; Endlich on Bldg. Assns. (2d ed.), sec. 269; Tate v. Lou. Bldg. Assn., 19 Ky. Law Rep., 1962; Genl. Stat., chap. 56, act of April 15, 1882; Genl. Stats., Bullitt & Feland ed. 1887, p. 773; act of 1893, secs. 564, 566, 577, 854, 855, 856, 857, 861 Ky. Stats.; Frankfort Bridge Co. v. City of Frankfort, 18 B. M., 46; Angell & Ames on Corps., sec. 256; McGregor v. Home Ins. Co., 33 N. J. Eq., 181; Cook on Corps. (4th ed.), sec. 278.
2. Notice. Oil City Land & Improvement Co. v. Porter, 99 Ky., 254; Wight v. Shelby R. R. Co., and Allen v. same, 16 B. M., 4; First Natl. Bk. v. Keifer, 15 Ky. Law Rep., 457; Bell & Coggeshall Co. v. Ky. Glass Works, 20 Ky. Law Rep., 1092; Park v. Railroad Co., 23 Ind., 572; Jenkins v. Prewitt, 7 Blackford, 329; Walker v. R. R. Co., 34 Miss., 255; Ellison v. Mobile & Ohio R. R. Co., 36 Miss., 572; Cook on Stock and Stockholders, sec. 54; Endlich on Bldg. Assns. (2d ed.), sec. 269; Thompson's Com. on Corps., sec. 941; Bertche v. Equitable, &c., Assn., 48 S. W. R., 954.
3. Innocent purchasers. American Wire Nail Co. v. Bayless, 91 Ky., 94; Kent v. Quicksilver Mining Co., 78 N. Y., 159.
4. Vested rights. Kent v. Quicksilver Mining Co., 78 N. Y., 159; Holyoke Bldg. & L. Assn. v. Lewis, 27 Pac. Rep., 872; Bergman v. Assn., 29 Minn., 275; McKenna v. Diamond State L. Assn., 18 Atl. Rep., 905; Niblack's Benefit Societies (2d ed.), 113; Thompson on Bldg. Assns., 31; Thompson's Com. on Corps., sec. 946; Cook on Stock and Stockholders, sec. 700a; Endlich on Bldg. Assns. (2d ed.), sec. 269; Cook on Corps. (4th ed.), sec. 4a, and numerous cases there cited.
5. Laches, acquiescence, assent and estoppel. American Wire Nail

Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

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Co. v. Bayless, 91 Ky., 94; Oil City Land & Improvement Co. v. Porter, 99 Ky., 254; Maxville, &c., Turnpike v. Barnes, 14 Ky. Law Rep., 431; Pocantico Water Co. v. Low, 46 N. Y. S., 633; Bannigan v. Bard, 134 U. S., 291; Cook on Corps. (4th ed.), secs. 41, 732; Kent v. Quicksilver Mining Co., 78 N. Y., 159.

6. Acts *ultra vires* and void. American Wire Nail Co. v. Bayless, 91 Ky., 94; Pocantico Water Co. v. Low, 46 N. Y. S., 633; Maxville, &c., Turnpike v. Barnes, 14 Ky. Law Rep., 431; Amer. & Foreign Christian Union v. Matilda Yount, &c., 1st Ky. Law Rep., 8; Springfield, &c., Turnpike Co. v. Trustees of Harrodsburg, 11 Ky. Law Rep., 309; Morton, &c., v. Hamilton College, 100 Ky., 281; Ger. Natl. Bank v. Louisville Butchers' Hide. &c., Co., 16 Ky. Law Rep., 881; Cook on Corps. (4th ed.), secs. 30, 268, 269, 671, 672, 673, 681, 775; Cook on Stock and Stockholders (3d ed.), sec. 278, and note; Hohenshell v. Home Savings & L. Assn., 41 S. W. R., 948; Barr v. N. Y., &c., R. R. Co., 125 N. Y., 263; Thompson v. Lambert, 44 Iowa, 239; Martin v. Niagara, &c., Co., 129 N. Y., 165; Wierman v. International, &c., Assn., 67 Ill. App., 550; Kadish v. Garden City, &c., Assn., 151 Ill., 531; Bertche v. Equitable, &c., Assn., 48 S. W. R., 954.

**J. C. POSTON AND CLARENCE DALLAM FOR THE COMMON STOCK-HOLDERS. (M. B. BOWDEN OF COUNSEL.)**

1. The rights of holders of preferred stock depend on the contract; and are solely a question of the interpretation of contracts. Beach on Private Corporations, sec. 499; Cook on Stockholders (3d ed.), sec. 267; Thompson on Corporations, secs. 2262, 2263.
2. Preferred stock of a corporation when not explicitly preferred in the distribution of the assets, is preferred only as to dividends. Beach on Private Corporations, sec. 507; 2 Waterman on Corps., p. 155; Cook on Stockholders (3d ed.), secs. 267, 278; Thompson on Corps., sec. 2280; *In re* London India Rubber Co., 5 L. R. Eq., 519.
3. A contract of guaranty can not be extended beyond its strict terms; and must be interpreted according to the intention of the parties. Cambria Iron Co. v. Keynes, 56 Ohio St., 501; Pease Piano Co. v. Matthews, 48 Pac. Rep., 449; Lininger, &c., v. Webb, 70 N. W. R., 519.
4. If this is a guaranty by the common stockholders of the contract of the corporation, it is within the Statute of Frauds and unenforceable. Ky. Stats., sec. 470.

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Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

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5. Where neither the charter, by-laws nor contract under which preferred stock is issued contemplates insolvency or the winding up of the company, the preference is to dividends only, and in the distribution of assets all become common stockholders, regardless of the preference. *In re India Rubber Co.*, 5 L. R. Eq., 519.
6. The so-called guaranty, if not confined to a guaranty of dividends, was an estimate as to when the stock would be matured, and was applicable to a going company only. *In re London India Rubber Co.*, 5 L. R. Eq., 519; *Bertche v. Equitable, &c., Assn.*, 48 S. W. R., 954.
7. Where a building and loan association guarantees the maturity of its stock within a certain specified time, it constitutes at best but a guarantee of such dividends as will mature the stock in the given time.
8. All contracts of building and loan associations to the effect that after the payment of a certain sum, less than the face value, stock shall be considered fully paid, are *ultra vires* and void. *Latimer v. Equitable L. &c. Co.*, 81 Fed. Rep., 776; *Bertche v. Equitable L. &c. Co.*, 48 S. W. R., 954; *International B. & Inv. L. Assn. v. King*, 68 Ill. App., 640; *Gibson v. Safety Homestead & L. Assn.*, 69 Ill. App., 485; *State, ex rel v. Equitable L. &c. Co.*, 41 S. W. R., 916; *Baltimore B. & L. Assn., v. Powhatan Imp. Co.*, 30 Atl., 275; *Fisher v. Patton*, 33 S. W. R., 450 and 34 S. W., 1096.
9. The pledge by a corporation of part of its capital for the benefit of a class of its shareholders is *ultra vires* null and void. *Miller's Exr. v. Batterman's Trustee*, 47 O. St., 158; *Weirman v. Int. B. L. & Inv. Union*, 87 Ill. App., 550; *Latimer v. Equitable, &c., Assn.*, 81 Fed. Rep., 776; *Bertche v. Equitable, &c., Assn.*, 48 S. W. R., 954.
10. Paid-up stock in a building and loan association can not be regarded as indebtedness of the association, especially where, as in this case, the charter provides for the creation of indebtedness. *Towle v. Am. B. & L. Assn.*, 75 Fed. Rep., 928.
11. There can be no unpaid subscription to the stock of a building and loan association. *Towle v. Am. B. & L. Assn.*, 75 Fed. Rep., 928.
12. Section 564 of the Kentucky Statutes does not restrict the inherent right of a corporation to give to the different classes of stock such preference as it desires; nor does it prescribe that

Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

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all preferred stock shall be entitled to a preference in capital, on dissolution, as well as in dividends, while in operation.

CHARLES C. FOX FOR THE APPELLEES, JOHN L. SMITH, &c.

1. What did the corporation mean to do and undertake to do when it guaranteed the maturity of the preferred stock?
2. Counsel discussed further the question of *ultra vires*.

WILLIAM FURLONG AND JOHN ROBERTS FOR APPELLEES' COMMON STOCKHOLDERS.

1. There is no authority under chapter 56 of the General Statutes of Kentucky, the law under which the Commercial Building Trust was organized, for the issue of preferred stock. Genl. Stats., ch. 56.
2. If preference is given to any stock it must be to the old stock already issued and not to stock to be thereafter issued, as was attempted in this case, and the requirements of the statute must be strictly followed, which was not done. Genl. Stats., p. 773, act of April 15, 1882.
3. The case of *Tate v. Louisville Building Assn.*, 19 Ky. Law Rep., 1962, is not applicable to this case.
4. The alleged preferred stock must be withdrawn in the manner provided in the by-laws of the corporation. Sec. 9 of by-laws.
5. The alleged preference or guaranty does not mature for seven years and is a mutual agreement, based upon the alleged preferred stockholders performing certain conditions, which they have not done, and the common stockholders are therefore released. Am. & Eng. Ency. of Law, vol. 3, p. 916, and cases there cited; *Alabama Gold Life Ins. Co. v. Garmany*, 74 Ga., 51. That is to say, the agreements of the common stockholders and the agreements of the preferred stockholders are interdependent and the contracts upon both sides becoming without fault of either, impossible of performance, the mutual obligations growing out of the mutual contracts are indiscriminately annulled, and the avails of the assets should be distributed among both classes, without discrimination, in proportion as each class contributed to provide the assets.

FAIRLEIGH, STRAUS & EAGLES, FOR APPELLEE—THE ASSIGNEE.

(Counsel submitted the case to the court with the suggestion that it was not expedient, if proper, for the assignee, being a mere

S. v.

Commercial Building Trust's Assignee, &amp;c.

5. To issue the correctness or incorrectness of the court below.)

MR. JUSTICE DELRIGG DELIVERED THE OPINION OF THE COURT.

Commercial Building Trust is a corporation organized February, 1892, under chapter 56 of the Statutes. The general nature of its business was to lend its money to its stockholders, especially with a view to aiding them to procure homes, and, in case of need, to lend it to other persons. The object of the corporation, as stated in its articles of incorporation, p. 8. The object of the corporation was "to afford its members a safe and profitable investment for their earnings, and an opportunity to obtain loans upon easy terms, to purchase homes, and establish themselves in business." By-laws, p. 9.

The capital stock was to consist of \$10,000,000—100,000 shares, of the par value of \$100 each—of preferred stock; and \$1,000,000—1,000 shares, of the par value of \$1,000 each—of common stock. The former, or preferred stock, was to be subscribed for and paid in upon such terms, and at such times, as the by-laws might prescribe; being in installments of small amounts, payable periodically or in larger payments, at the election of the subscriber. The common stock was to be subscribed for and paid in upon such terms, and at such times, as the board of directors might, from time to time, determine, and it might be issued in monthly or other periodical series. We conclude, therefore, that the business of the concern, to all practical intents, was that of an ordinary building and loan association, so extended and amplified, however, as to embrace objects and purposes wholly foreign to such associations proper, and which have been condemned by this court in numerous cases.

The articles of incorporation provide that "the preferred



stock is guaranteed by this corporation to mature, and be payable, in seven years from the date of the payment of the first installment paid on said stock."

And a by-law provides that the funds of the common stock "shall constitute the guaranty for the maturity of the preferred stock."

This preferred stock was to be issued in various classes, in some of which the dividend to be paid was at the rate of 8 per centum per annum, and in others at the rate of 10 per centum per annum, all payable semi-annually.

As soon as organized, the corporation began business, and issued, from time to time, both common and preferred stock. Becoming insolvent, however, it made, in June, 1897, for the benefit of its creditors, an assignment of all its assets to the Columbia Finance & Trust Company. In the administration of the trust, the question was presented to the chancellor, in a suit brought for a settlement of the estate, whether, there not being enough money to pay the alleged preferred stockholders in full, the entire funds of the corporation should be distributed to them, to the exclusion of the common stockholders.

The chancellor answered this question by holding "that none of the stock of the defendant corporation is entitled to a preference over other stock in said corporation, and that all stockholders, indiscriminately, shall share equally in the distribution of the assets of the corporation in the hands of the assignee, in proportion to the amounts paid into the corporation by them, respectively, on their stock, after the payment of its debts, and the proper costs, expenses, and charges of the assignee in the execution of the trust."

The correctness of this judgment is the sole question presented on this appeal. Without reference, for the pres-

ent, to certain interesting questions ably discussed by counsel, involving the validity of the issual of preferred stock by this corporation, we turn at once to a consideration of the terms of the contract by which the corporation guaranteed that its preferred stock should "mature and be payable in seven years from the date of the payment of the first installment paid on said stock."

This is the only provision on the subject of guaranty to be found in the articles of incorporation, and it seems to apply only to installment stock. So construing it, the provision means simply that, upon the subscriber for this stock making his monthly payments of 60 cents per share for the period of seven years, or \$50.40 in the aggregate, the corporation guaranteed that the dividends thereon would so accumulate as that the stock would be worth \$1 per share. Putting the guaranty in another form, the corporation guaranteed that it would declare, at the end of seven years, a dividend of \$49.60 on each share of preferred installment stock, but this stock is to be paid for in monthly installments of 60 cents per month.

In the by-laws, however, there is a further provision, by which the corporation "guaranteed the maturity of class D installment stock in seven years from the date of the first month's dues paid thereon, and class E installment stock in ten years from the date of the first month's dues paid thereon, and class F paid-up stock in seven years from the date of its issuance. Here, again, is merely a guarantee that dividends sufficient to mature certain classes of installment stock and a class of paid-up stock would be declared at the end of seven years. The subscribers to this stock were members of the association, and participants in the scheme of so loaning out its funds as that the usurious rates were

to be realized. It was by reason of the unlawful and usurious character of this scheme, which was adopted by the association with the approval and by the votes of these members or their representatives, that the enterprise failed of execution; and, when it failed, the so-called "guarantee" was at an end.

Moreover, the guarantee on the part of the company that it would declare, in a given time, certain dividends, or dividends sufficient to mature certain stock, or an agreement that it would set apart certain other stock as a guarantee of such dividends, can not be enforced unless there are net profits—dividends proper—out of which the guarantee can be made good and the dividends paid. The reason is because the contract does not, and can not, in the nature of things, create the relation of debtor and creditor. The member is a shareholder in the association—a preferred one, it is true—when there are profits out of which he may be paid; otherwise, not. Mr. Cook, in his work on Corporations, says (section 271): "The law is now clearly settled that a preferred stockholder is not a corporate creditor. A contract that dividends shall be paid on the preferred stock, whether any profits are made or not, would be contrary to public policy, and void. An agreement to pay dividends absolutely and at all events, from the profits when there are any, and from the capital when there are not, is an undertaking which is contrary to law and is void. Public policy condemns, with emphasis, any such undertaking on the part of a corporation as to its preferred or guaranteed shares." (See, also, Taft, Trustee, v. Hartford, &c., R. R. Co., 8 R. I., 310; Lockhart v. Van Alstyne, 31 Mich., 76, [18 Am. R., 156].)

The contract then is a guarantee of dividends sufficient to mature the stock, and is enforceable

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Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

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only if there are profits sufficient for that purpose. In this insolvent association there are no profits, and there can be no dividends, a guarantee to the contrary notwithstanding. This may not be very material to appellant, as he is reaching after the capital and all assets on hand not profits. But it follows, from what we have said, that the guarantee has reference solely to a preference in the distribution of dividends. It has no reference to a distribution of assets apart from dividends, and especially no reference to such distribution on the winding up or insolvency of the concern. The agreement to make enough profits to mature the preferred stock in seven years, and a pledge of the common stock for that purpose, looked to a going concern; at least, it was expected to be a live and running association for seven years. It is not contended the guarantee was that the corporation was to last for that time. We think it clear that the period of winding up having arrived, with no profits on hand, the distribution of the capital and assets of the concern is not to be controlled by a provision or guarantee looking solely to the maturity of stock, or, what is the same thing, the distribution of dividends, in due course, in a running or going association.

*In re* London India Rubber Co., 5 L. R., Eq., 519, there was a provision in the company's charter securing to preferred stock a bonus or dividend out of money produced by the sale of certain property, not required by the company in the conduct of its business. This property was, in effect, pledged to the preferred stockholders, to secure this bonus or dividend, just as it is argued here we have a charge on the common stock to secure the maturity of the preferred stock by dividends large enough to mature it. It was argued in that case that the bonus or dividend should be paid out of the proceeds of the property when sold. The

court, however, said: "But I think it is plain that the 161st clause is directed to a going or continuing concern. It does not, in the slightest degree, contemplate a breaking up of the company, and is not intended to define the rights of the parties in the happening of that unfortunate event. This clause has no application to the event which has happened. The fund is not dividend. It represents the capital of the company, and, not being otherwise provided for, it must, in my opinion, as I originally decided, be divided among the shareholders pro rata, according to the amount of capital which each shareholder has in the concern; in other words, among the two classes of shareholders equally. I wish it to be considered that I decide the case upon this principle: That where there is a provision for preferential dividends, but no provision for the division of capital, upon the breaking up of the concern any surplus must be distributed among the shareholders according to their capital, without reference to their rights in respect to dividends."

So, we think here, the by-laws providing that the funds of the common stock shall constitute the guarantee for the maturity of the preferred stock means that the common stock fund was a guaranty for the accumulation—the earning—of sufficient profits or dividend to mature the preferred stock, in a continuing association, and continuing, too, on a plan or scheme well known to all its members. There is no provision in the corporation's charter or its by-laws, or in any of the certificates of stock or indorsements or specifications accompanying the stock, declaring that there was to be any preference given one class of stock over another in the capital or body of the concern. In the absence of such a provision, the stock is preferred only in the sense that it has priority in the distribution of dividends. The

Sumrall, &c., v. Commercial Building Trust's Assignee, &c.

contract we are considering, then, by fair construction, refers only to preferential dividends, and this is the ordinary effect to be given the use of the words "preferred stock."

In Cook on Stockholders (3d Ed.), sec. 267, it is said: "By 'preferred stock' is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock can receive a dividend from such earnings. In other words, it is stock entitled to dividends from the income or earnings of the corporation before any other dividend can be paid." And the same author (section 278) says: "Upon the dissolution of a corporation, and the distribution of its assets among the shareholders after the payment of the corporate indebtedness, it is the settled rule of law that, in the absence of any provision in the statutes, by-laws, or certificate to the contrary, preferred stockholders have no priority over common stockholders."

See, also, Beach on Private Corporations, sec. 507; 2 Waterman on Corp., sec. 155; 2 Thompson on Corp., secs. 2278-2280.

When we bear in mind that the corporation we are dealing with is a building and loan association, with certain underlying principles of co-operation, equality, and mutuality in its make-up not common to ordinary corporations, and which may be termed the "common law of its existence," the objections to upholding preferential contracts among members become apparent.

All such attempts are absolutely void, as contrary to the natural law of such associations. If their managers may attract investors by selling them preferred stock—preferred either as respects dividends or capital—the burdens of maintaining the organization, and in all probability all the losses of the concern,

in case of embarrassment or insolvency, will fall on the very class of members who were primarily intended to be benefited by such associations. In *King v. Investment Union* (Ill. Sup.) [48 N. E. 677], it was said: "The plan of issuing stock containing such agreements is entirely foreign to the purposes of the corporation contemplated by the statute under which the one at bar was organized, and we can but regard it as of no force and effect." To the same effect are the cases of *Trowbridge v. Hamilton* (Wash.) 52 Pac. 328, and of *Wierman v. Investment Union*, 67 Ill. App., 550, although in these cases a by-law undertook to authorize the contract of preference. In the case of *Latimer v. Building & Loan Co.*, 81 Fed., 776, the question arose as to whether or not a building association, established under the statutes of Missouri, substantially similar to those of Kentucky, could provide for the issuance of paid-up stock, and secure its redemption by a trust deed upon its assets. The court held that, independent of statutory provision, a building and loan company had an implied power to receive a prepayment of its stock, and to issue paid-up stock, but that any attempt to give a preference to such stock was against the policy of the common law governing such institutions, and was against the policy of the statute, and was absolutely void. In passing upon the question in that case, the court said: "The next and last question to be considered is whether the complainant, as the holder of the certificates in question, is entitled to any preferential right in and to the property undertaken to be pledged to secure their payment. This must be answered by determining whether the defendant association had the power to make the contract so pledging such property. 'The elementary working principle of the building association scheme,' according to Endlich (Bldg. Ass'ns, sec. 122), is 'system of

## Spratt v. Allen.

perfect mutuality and reciprocity and equality of all members.' No provision is found in the organic law authorizing an association like the defendant to pledge any of its assets for the retirement or payment of any of its stock, nor is there any general power conferred by statute upon loan and building associations to issue preferred preferential stock, from which authority for pledging its assets to secure the payment of any of its stock may be inferred. Under such state of facts, it must, in my opinion, be held that the pledge of corporate assets for the retirement or payment of a certain class of its stock, in preference to others, is so violative of elementary requirements of equality and mutuality as to be absolutely void." We fully concur, therefore, in the chancellor's judgment denying any preference to the so-called preferred over the common stockholders in the distribution of the assets of this association. The suggestion that the appellees have not in fact paid anything into the concern on their stock is guarded against in the orders below by requiring proof of all claims, in the usual way, before the master. The judgment is affirmed.

The whole court sitting.

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CASE 30—HOMESTEAD—MAR 21.

## Spratt v. Allen.

APPEAL FROM BATH CIRCUIT COURT.

1. HOMESTEAD IN LANDS DESCENDED.—A *bona fide* housekeeper with a family who acquires land by descent is entitled within a reasonable time after the death of his ancestor to build a residence and move on to the land and his right to a homestead

106	274
1129	582



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Spratt v. Allen.

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will be superior to the claim of an antecedent creditor who had an execution levied on the land before the erection of the improvements.

2. **SAME.**—A husband is not entitled to a homestead in his wife's land prior to the latter's death; and the fact that he occupied same for that purpose prior to the acquisition of lands by descent will not preclude him from claiming a homestead in lands so acquired.

**REUBEN GUDGELL & SON FOR APPELLANT. (J. J. NESBITT OF COUNSEL.**

1. The court erred in refusing to adjudge that the appellant was entitled to a homestead in the land descended from his mother. *Dwelly v. Galbraith, &c.*, 5 Ky. Law Rep., 209; *Jewell v. Clarke*, 78 Ky., 388; *Miller v. Bennett*, 11 Ky. Law Rep., 391; *Meador v. Meador*, 10 Ky. Law Rep., 784.
2. The appellant was not entitled to a homestead in the land of his wife while the latter was yet living. *Summers v. Sprigg*, 18 Ky. Law Rep., 206.
3. The appellee failed to show a legal title to the land. The levy of the execution created a mere lien. Ky. Stats., sec. 1692; *Morton v. Robards*, 4 Dana, 258; *McBurnie v. Overstreet*, 8 B. M., 300; *Sharp v. Roe*, 13 Bush, 461; *Bunnell v. Thompson*, 12 Bush, 118.

**COURTLAND P. CHENAULT ALSO FOR THE APPELLANT.**

1. The appellant had no right to a homestead in the land of his wife.
2. The statute provided that a homestead right did not prevail over a debt existing prior to the purchase of land or the erection of improvements has no application to land inherited and not purchased.

Citations: *Jewell v. Clarke*, 78 Ky., 398; *Dwelly v. Galbraith*, 5 Ky. Law Rep., 209; *Miller v. Bennett*, 11 Ky. Law Rep., 391; *Meador v. Meador*, 10 Ky. Law Rep., 784; *Johnson v. Kessler*, 87 Ky., 458; *Summers v. Sprigg*, 18 Ky. Law Rep., 206.

**C. W. GOODPASTER FOR THE APPELLEE.**

Inasmuch as appellant owns a curtesy in his wife's 135 acres of land which they had used and occupied as a homestead, prior to the death of the appellant's mother, appellant was entitled to a homestead in that land and not in the land

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Spratt v. Allen.

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inherited from his mother. Vanmeter v. Vanmeter's Assignee, 12 Ky. Law Rep., 215.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The appellant, Spratt, is a son of Mary A. Spratt, who died March 10, 1896, seized and possessed of a tract of land containing 105 acres, near Sharpsburg, and he inherited from his mother one-twelfth of it. At the time of her death he was living on a tract of land owned by his wife, and on April 1st following he moved with her upon the 105-acre tract, and lived in the house formerly occupied by his mother, until the tract was partitioned, which occurred in the course of a few months, and there was assigned to him 11 acres. He built a house upon the land, and moved into it five days after it had been assigned to him, and now claims it as his homestead. His interest in the land was sold under an execution in favor of the appellee whilst he lived upon it, though the execution was levied upon it March 10, 1896. The debt upon which the judgment was rendered was one which existed prior to the death of his mother. His wife continued to own the tract from which they had moved. The appellee instituted a proceeding to recover possession of the land, and claimed it under a purchase at the execution sale. The appellant denied his right to recover possession, and in his answer the facts appear which we have stated. To that answer the court sustained a demurrer, and rendered judgment against him in favor of the appellee for the possession of the land.

The fact that the debt for which the appellant's land was sold was contracted prior to his mother's death does not deprive him of the right to claim it as a homestead. The statute is to the effect that a party is not entitled to claim a homestead against a debt or liability which existed prior to the *purchase of the land, or the erection of the improvements thereon.*

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Spratt v. Allen.

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It was held in *Jewell v. Clark's Ex'r*, 78 Ky., 398, where a party acquires land *by descent*, and not by *purchase*, he is entitled to claim a homestead in it against pre-existing debts.

*Dwelly v. Gailbraith*, 5 Ky. Law Rep., 209, is to the same effect.

In *Miller v. Bennett*, 11 Ky. Law Rep., 391, [12 S. W., 194], it appeared that the land had descended to the debtor from his father; that about four months after his father's death, and about ten days after the partition of the land in which he had an interest, he moved upon it, and resided there with his family—the court holding that he was entitled to a homestead against one who had purchased his undivided interest at a sale under execution prior to his occupancy, and that the delay in moving upon the land was not unreasonable.

One to whom land descends has a reasonable time after he thus acquires an interest in it to move upon it and claim a homestead therein.

The views we have expressed are supported by *Meador v. Meador*, 88 Ky., 27, [10 S. W., 651].

It is, however, insisted that because the wife of the appellant owned a tract of land containing 135 acres, worth \$40 per acre, from which he moved to the land in contest, he is not entitled to a homestead in it. His wife still lives, and he is not entitled to a homestead in her land during her life. It is only at the death of the wife, if at all, that a husband can claim a homestead in her land. Whilst the wife lives the husband is no more entitled to have assigned to him out of her land a homestead, as exempt from the payment of his debts, than he would out of that owned by anybody else. *Summers v. Sprigg*, 16 Ky. Law Rep., 206, [35 S. W., 1033].

The exemption which the law gives him is of his own property, not that of his wife. Her property is not liable to the payment of his debts. *Johnson v. Kessler*, 87 Ky., 460, [9 S.W., 394].

Counsel for appellant relies upon the case of *Vanmeter v. Vanmeter's Assignee*, 12 Ky. Law Rep., 214, [13 S.W., 924], to sustain his position. If Vanmeter's wife was living at the time the homestead was assigned to him, the case is utterly inconsistent with the principles announced in the cases cited above, and disregards the statute which allows a husband who is a *bona fide* housekeeper with a family a homestead out of his own land. The demurrer admits the facts to be true, and from them, as they appear in the answer of the appellant, he is entitled to hold the 11 acres of land as a homestead. The judgment is reversed for proceedings consistent with this opinion.

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CASE 31—ACTION ON NOTE—MARCH 22.

Cunningham's Administrator, Etc. v. Speagle.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. EVIDENCE—TRANSACTION WITH DECEDENT.—In an action on a promissory note alleged to have been executed by mark by a person who is dead at the time of the trial the plaintiff is not a competent witness to prove either (1) the execution of the writing by the decedent, or (2) the hand-writing of the attesting witness, or (3) the execution of an executory contract out of which the note was claimed to have arisen.
2. SAME.—In such an action it is error to permit plaintiff's attorney to testify as to a credit on the note and especially to detail the statements made to him by the plaintiff with reference to such payment.
3. ATTORNEY—MISCONDUCT OF.—It was error, if objected to, to per-

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Cunningham's Admr., &c., v. Speagle.

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mit counsel for the plaintiff to state to the jury his reasons for not bringing as witnesses the members of the family of the attesting witness to prove the genuineness of his signature.

B. T. SOUTHGATE AND GEORGE R. HUNT FOR THE APPELLANT.

1. It was error to permit plaintiff to state that she saw Armstrong sign his name to the note as an attesting witness; and further, that she was familiar with the signature and hand-writing of Armstrong and that his name as it appeared in the note was in his hand-writing. Civil Code, sec. 606, sub-sec. 2; Holliday v. McKinnie, 22 Florida, 153; Maverick v. Marvel, 90 N. Y., 656; Koehler v. Adler, 91 N. Y., 657; Berry v. Stevens, 69 Maine, 290; Jones on Evidence, vol. 3, 793; Gist v. Gaust, 30 Ark, 285; Anchampaugh v. Schmidt, 72 Iowa, 656; Howard v. Zimpleman, 14 S. W. R., 59; Dicken v. Winters, 169 Penn. St., 126; Hurry v. Kline, 93 Ky., 358; Hardin's Admr. v. Taylor, 78 Ky., 593.
2. The verdict is not supported by the evidence.
3. It was misconduct of counsel for the defendant to comment in his argument to the jury upon the deposition which had been excluded by the court.

(No appearance for the appellee.)

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

On the 17th of February, 1896, the plaintiff (now appellee), Ella C. Speagle, instituted this action in the Fayette circuit court against the appellants. It is substantially alleged in the petition that Rachel Cunningham on the 9th of June, 1887, executed to the plaintiff her promissory note for \$150, due in 36 months, with interest at 6 per cent. The petition also shows that the obligor is dead, and that Marshall is her administrator, and that the other defendants are heirs at law. Said note reads as follows:

"Lexington, Ky., June 9th, 1887. Thirty-six months after date, I promise to pay to Ella C. Speagle one hundred and fifty dollars, with interest at six per cent.

her

"Rachel X Cunningham.

mark

"Witness: J. M. Armstrong."

It further appears from the petition that the note is entitled to a credit of \$12.50 as of the date of the note.

The first paragraph of the answer is a plea of *non est factum*, and the second paragraph pleads no consideration.

The reply denies that the note was without consideration, but does not show what the consideration was. A jury trial resulted in a verdict and judgment for plaintiff for \$137.50, with interest "from this date," and costs. The date of the rendition of the judgment seems to be February 5, 1897. Defendants' motion for a new trial having been overruled, they prosecute this appeal.

The grounds relied on for a new trial are, in substance, as follows: (1) Error of the court in admitting improper and incompetent evidence to go to the jury, and in excluding proper and competent evidence (2) Because the verdict is not sustained by the evidence, and is contrary to the law. (3) Because of misconduct of plaintiff's attorney in commenting on evidence in his argument before the jury.

The plaintiff was introduced as a witness on her own behalf, and stated that she knew Rachel Cunningham, and had known her from childhood, and that she died in 1890 or 1891, and had no property, that witness knew of, except her home, on De Rood street. J. M. Armstrong was a tenant of witness in 1887, and died in 1890. She was then asked whether she saw J. M. Armstrong sign his name as attesting witness to the note, to which objection was made by defendants, and sustained by the court. She was next asked whether or not she was familiar with the handwriting of J. M. Armstrong, from having seen him write. She answered: "Yes; I am." The next question was: "Then, from your familiarity with his handwriting, I will ask you whether his name, as appears on that note, is his handwriting. Is that his handwriting?" Defendants objected,

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Cunningham's Admr., &c., v. Speagle.

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which objection was overruled, with exceptions. The witness answered: "Yes; that is his ~~writing~~—his signature." The note was then offered in evidence, and over defendants' objection was read to the jury, and also shown to them. The contract was then shown to the witness, which was also attested by the signature of J. M. Armstrong, and over the objection of defendants she was permitted to prove the handwriting of Armstrong; and the contract was then read in evidence. The contract reads as follows:

"Lexington, Ky., June 9th, 1887. This contract between Ella C. Speagle and Rachel Cunningham, made this day, witnesseth that Ella C. Speagle agrees to loan Rachel Cunningham the sum of one hundred and fifty dollars, to be paid in installments as Rachel Cunningham needs it; and, as soon as the entire one hundred and fifty dollars is paid, Rachel Cunningham agrees to execute a mortgage to Ella C. Speagle on her house on De Rood street. Rachel Cunningham authorizes Ella C. Speagle to sign her name to all receipts, to the amounts delivered to her, when they are delivered.

"Ella C. Speagle.

<sup>her</sup>  
"Rachel X Cunningham.  
<sup>mark</sup>

"Attest: J. M. Armstrong."

The testimony of plaintiff tends to show that she (plaintiff) was at the time worth several thousand dollars, and that Rachel Cunningham was an old negro, probably 65 years old; that she was very poor, and had nothing except her property on De Rood street, which was worth \$150 or \$200; and that she made a living by washing for negroes, and raised a little garden in her yard. Armstrong was a brakeman on the Cincinnati

Southern Railroad, and he died in 1890 or 1891. His mother and family live in Lexington. I have seen him write a number of times, but I have no writing done by him. I am not in the habit of lending money to negroes."

It was then admitted that the note and contract, and the name of Rachel Cunningham signed thereto, are all in the handwriting of plaintiff, Ella C. Speagle.

The next witness was the attorney for plaintiff, who stated that he was the attorney for plaintiff, and that he put the \$12.50 credit on the back of the note sued on, and that he put the credit there at plaintiff's request; she having told him that she had furnished \$12.50, less than the \$150. To all these statements defendant's attorney excepted.

Plaintiff's attorney then offered in evidence various receipts, purporting to be the receipts of Rachel Cunningham to Speagle, in amounts from one to three dollars, all in Speagle's handwriting, and signed, "Rachel Cunningham, her mark;" but no mark is put in, and no attesting witness.

George Stout testified that J. M. Armstrong was his brother-in-law, and that he had known him all his life; that Armstrong could write his name, but not well; that witness was familiar with his handwriting, and knew his signature. Armstrong's alleged signature being shown to him, he said: "That is not his signature. He can not write near that well. Am positive, from my familiarity with his handwriting, that it is not his writing. I knew Rachel Cunningham very well and she was very poor; had nothing but her house and lot on De Rood street, and washed for negroes." The statement of counsel in his argument, complained of, is as follows: "In reply to Mr. Southgate's comment on my not bringing Armstrong's



family here to prove his signature, I will say that this was originally a chancery case, and in such cases depositions are allowable, and I took the deposition of Underwood, who was Armstrong's father-in-law, to prove his signature, but the court would not allow it read; and my client ought not to suffer on account of the ignorance of her attorney." To all of which defendants objected and excepted.

It is perfectly manifest that the court erred in allowing plaintiff's attorney to testify as to the \$12.50 credit being placed upon the note, and especially to detail the statement made concerning the same to him by the plaintiff. We are further of opinion that the statement of the attorney in his argument to the jury should not have been made or permitted, if objected to. The receipts offered in evidence do not appear to be copied in this record, and we can not, therefore, pass on the question of their admissibility as evidence. We are further of opinion that the execution of the so-called contract in regard to the mortgage should not have been admitted, first, because its execution was not sufficiently proven, if, indeed, the contract was evidence at all, which might be well doubted.

It is earnestly insisted for appellants that the court erred in allowing plaintiff to testify that the signature of the subscribing witness to the note was the handwriting or genuine signature of the witness. Subsection 2, of section 606, provides, in substance, that no person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by an infant under fourteen years of age, or by one who is of unsound mind or dead, when such testimony is offered to be given, except for the purpose and to the extent of affecting one who is alive, and who, when over fourteen years of age and of sound mind, heard such statement,

or was present when such transaction took place or when such act was done or omitted; subject, however, to several exceptions as stated in the Code, none of which are claimed to exist in the case at bar.

The main question for decision is whether the proof of the genuineness of the handwriting of the witness can be made by the plaintiff herself, the alleged obligor being dead. It has been repeatedly held by this court that the object of the statute *supra* was to place the decedent and his live antagonist upon a perfect equality, and, inasmuch as the decedent could not speak or testify of the transaction, that the party claiming the right to enforce the same, or deriving a benefit therefrom, should not be heard to testify in respect thereto.

It is said in Underhill on Evidence (page 441): "The rule excluding the evidence of a personal transaction with a deceased person operates to prevent the survivor from testifying to the contents of a letter sent to the deceased, or to the fact that the letter was delivered to him, though it does not prevent the introduction of the writing executed by him. The writing can not be explained by the testimony of a party or interested witness. \* \* \*"

And on page 442 it is said: "The prohibition of the introduction of evidence of a personal transaction with deceased should be construed, not only to prevent the introduction of direct proof of such a transaction, but to prevent its proof by indirection as well: So the surviving party ought not to be permitted to attempt to prove a transaction inferentially by offering evidence that some third person did not do the thing which deceased is alleged to have done, or by disconnecting any particular fact from its surroundings, and prove it as a seemingly independent fact, when in truth it originated in, was caused by or was

connected with a personal transaction, evidence of which is inadmissible."

In Jones on Evidence, vol. 3, sec. 793, it is said: "The term 'transaction,' which is used in nearly all the statutes, has not been given any very definite meaning by the courts. Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise, is a transaction. It is a broader term than 'contract,' for while every contract is a transaction, every transaction is not a contract. But the courts have interpreted the term as the justice of each case seemed to demand, rather than by any abstract definition, as will be seen by a few of the decided cases. The execution of a note by a deceased person, or the delivery of a letter or of property, is such a transaction with the deceased as to render the adverse party incompetent to testify to the same, under the statute. \* \* Nor can he testify that the account sued on is correct, or that the work done has not been paid for, or as to the kind of work done, or what pay was expected for the same, or that the note in question had been paid, or that the money had been deposited with the deceased or incompetent person."

The supreme court of Florida, in Holliday v. McKinne, 22 Fla. 161, had under consideration the question of proving the signature of a deceased person to a writing. In that case the witness was permitted to answer that the signature was in the handwriting of E. K. Holliday, deceased; the object being to prove the execution of the writing. The question as to whether McKinne was competent to prove the signature to the bill of sale was raised by exception to the question and answer. The court then said: "The statute provides that 'no party to such action or proceeding, nor any person interested in the event

thereof, \* \* \* shall be examined as a witness in regard to any transaction or communication between such witness and the person at the time of such examination deceased, etc., etc. The bill of sale alleged to have been signed by the deceased transferred title to the property therein mentioned to the plaintiff. Was not such transfer the very transaction which consummated the right of plaintiff to the recovery, and upon which alone he based his right of action? The word 'transaction' is defined to mean 'the doing or performing any business; the management of an affair.' On pages 162 and 163 it is said: "It seems to us that the proof of the signature to the bill was proving the very 'transaction,' or proving both the acts and doings of the plaintiff and the defendant which amounted to consummating the sale of the property by defendant to this plaintiff. The sale of the property and the execution of the bill of sale was the 'transaction,' and the proof of the bill of sale was proof of the transaction."

In *Bruster & Maverick v. Marvel*, 90 N. Y., 656, the New York Court of Appeals, in substance, said: "It seems that when the mere fact that a party has had conversations with a deceased person, to whom the opposite party stands in the relation specified in the provisions of the Code of Civil Procedure in reference to the testimony of parties (section 829) is a material question, it is not competent for such party to testify that he had the conversation."

In *Koehler v. Adler's Admr.* 91 N. Y., 657, it was claimed by plaintiff that the loan was made by check given by him to defendant's intestate. The defendants claimed that the check was given in the business of the Stonewall Oil Company, of which corporation deceased was president, and plaintiff treasurer. The latter kept no separate bank account of the funds of the corporation, but deposited them

in his own name, and drew his individual checks, which payments were made on corporate contracts or liabilities. The plaintiff offered himself as a witness on the trial, and was asked by counsel whether the check in question had anything to do with the affairs of the Stonewall Oil Company. This was objected to on the ground that it called for a personal transaction with the deceased, and was incompetent, under section 829 of the Code. The objection was sustained, and it was claimed that the ruling of the court in excluding the evidence was erroneous. The court then said: "We are of opinion that this point is not tenable. The check, on its face, imported a personal transaction between the plaintiff and the intestate. The point in issue was whether it related to an individual transaction of Koehler's, or to a transaction by him as treasurer of the Stonewall Oil Company. The giving of the check was consistent with either theory, and, when the witness was asked whether it had anything to do with the affairs of the Stonewall Oil Company, he was called upon by his answer to characterize the transaction either as an individual or a corporate one. The answer to the question would necessarily show what the transaction was, and the plain purpose of the inquiry was to negative the possible inference from the circumstances that the check was given by the plaintiff as treasurer of the oil company."

In *Howard v. Zimpleman* (decided by the supreme court of Texas) [14 S. W., 59], the court, in discussing the question under consideration, said: "It is error to allow plaintiff to testify as to his reception of the instrument through the post office with a certain post mark, for the purpose of proving the delivery thereof by the deceased grantor, since such delivery is a 'transaction' with the deceased, within the meaning of Rev. St. Tex. art. 2248, prohibiting a party

to an action against the heirs of a deceased person from testifying as to any transaction with such decedent."

In *Huttry v. Kline*, 93 Ky., 358, [20 S. W., 277], it appears that appellee executed a note to J. T. Irvin, who assigned it to appellant. The appellee pleaded no consideration, and was permitted to testify as to what took place concerning the execution and consideration of the note between himself and Irvin, who had died. The court in that case said: "And the decisive question before us is whether that testimony is competent; as, without it, his only defense must, as the record now appears, fail." The court then, after quoting sections 605 and 606 of the Code, said: "If Irvin had died owner of the note, and this was an action by his personal representative to recover judgment thereon, or even if appellant had, by reason of the assignment to him, recourse on decedent's estate, the testimony in question would, we think, be certainly incompetent. But it seems to be conceded that, if appellant ever had such recourse, it has been lost; and so the estate of the deceased assignor will not be affected by determination of this action one way or another. Nevertheless, we think there can be, according to the plain language used, no question of cases like this being comprehended by the exceptions to, and modifications of, section 605 that are contained in subsection 2 of section 606; for it is there provided in explicit terms that no person shall testify for himself concerning any verbal statement of, transaction with, or act done or omitted to be done by, one who is dead, when the testimony is offered to be given, except under circumstances and conditions recited, none of which exists in this case. Yet that is precisely what appellee did do on trial of this action in the lower court; for the statements of and transactions with the deceased, Irvin, concerning which he was permit-

ted to testify, had a direct, and, without doubt, decisive, bearing in his favor upon the only issue involved.

"Before thus disregarding or restricting the natural and obvious meaning of the words of a statute, the court should be convinced an imperative reason for doing so exists. We do not now perceive any reason for excluding such testimony in an action by the personal representative of one who is dead that does not exist in full force in a case like this.

"The issue here presented is one of fact, involving an inquiry for the simple truth, not at all changed or affected by death, but to be sought for according to rules of evidence intended to operate justly, equally, and mutually between the parties, no matter who they may be. It does not, therefore, make any difference whether the personal representative of a deceased payee or the assignee of a note be party plaintiff in an action to recover on it; to permit the defendant to testify for himself concerning what was said or done by the decedent, thereby affecting the issue involved, without the presence or power of any one to speak for the dead man, would give him an unjust and unfair advantage in one case just as much as, no more than, the other, which the Legislature did not intend for him to have, but carefully and particularly framed subsection 2 of section 606 to prevent.

"In *Harpending v. Daniel*, 80 Ky., 449, the question was whether, in an action against an executor to recover on a protested check given to a firm, a member of the firm, who had assigned his interest to the other member, could, under the Civil Code, testify to what was said and done concerning time for presenting the check for payment, by an agent in reference thereto, who was then dead. And it was there held that, as the agent with whom

the transaction was had was dead, the opposing party could not testify on the subject, even if the principal was alive, because, as said (quoting from *Hardin's Adm'r. v. Taylor*, 78 Ky., 593), 'The evident design of section 606 was to place parties to an action, or those interested therein, on an equal footing when their rights are being passed on.'

'There are cases cited by counsel with the purpose of sustaining ruling of the lower court in this case, but, without referring to them in detail, we are satisfied that no one, when properly understood, sustains the proposition that one party, whether for or against a personal representative or assignee of one who is dead, can testify for himself concerning what the decedent said or did affecting the issue being tried.

"We think the evidence of appellee, to which reference is here made, was clearly incompetent, and, as it materially prejudiced the rights of appellant, the judgment is reversed, and cause remanded for a new trial consistent with this opinion."

It is true that this court, in *Meazels v. Martin*, 93 Ky., 50, [18 S. W., 1028], decided that the provisions of the statute and Code of Practice in regard to the attestation by a witness of a signature, where the same is made by mark, applies only to documents which by law are required to be witnessed, and that a note signed by a mark, without an attesting witness, if in fact the obligor authorized his name to be signed to the document, is valid and enforceable, the effect of which seems to show that an attesting witness is not necessary to the validity of a note executed and delivered, although not signed by the obligor in his own handwriting.

It is, however, manifest from the pleadings in this case that the execution and attestation of the note in controversy was one and the same transac-



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Forwood v. Eubank, Assignee, &c.

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tion, and clearly, according to plaintiff's own averments, a transaction or contract had with the decedent Rachel Cunningham; hence it follows that any statement of plaintiff as to the genuineness of the signature either of the obligor or the attesting witness was proof of a transaction had with a deceased person, and therefore clearly incompetent, under all the authorities hereinbefore quoted.

It seems to be conceded by appellants that the genuineness of the handwriting of the witness may be proven by a competent witness. At any rate, that question is not presented for decision. For the errors indicated, the judgment appealed from is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

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CASE 32—LIQUIDATION OF BUILDING ASSOCIATION—  
MARCH 22.

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**Forwood v. Eubank, Assignee, Etc.**

APPEAL FROM COMMON PLEAS DIVISION OF JEFFERSON CIRCUIT COURT.

**BUILDING AND LOAN ASSOCIATIONS—WITHDRAWING STOCKHOLDERS NOT CREDITORS.**—In the liquidation of the affairs of an insolvent building and loan association, the holder of paid-up stock who has given notice of withdrawal prior to the assignment will not be entitled to preference over the holders of installment stock.

**C. B. SEYMOUR AND O. H. HARRISON FOR THE APPELLANT.**

The appellant, under the facts of this case, was a creditor, and not a stockholder, and as such was entitled to preference over the stockholders in the distribution of the assigned assets.

**KOHN, BAIRD & SPINDLE AND JAMES P. GREGORY FOR APPELLEES.**

1. The relation created between appellant and the Globe Building & Loan Company was that of stockholder in the corporation, and

## Forwood v. Eubank, Assignee, &amp;c.

not creditor and debtor. By-laws, sec. 1, art. 5; Cook on Corps. (4th ed.), vol. 1, sec. 12, p. 40; Towle v. Bldg. Co., 78 Fed. Rep., 688; Styles' Appeal, 95 Pa. St., 122; State v. Bldg. Co., 35 O. St., 258; *In re* Professional Bldg. Co., L. R. —, 6 Ch., 856; Murray v. Scott, L. R., 9 App., 552; Frankfort Bridge Co. v. City of Frankfort, 18 B. M., 46; Bank v. Kiefer Milling Co., 95 Ky., 97.

2. Both the charter and by-laws of the Globe Building & Loan Company and the Statutes of Kentucky forbid the creation of any preferences among members of a building and loan association. Gen. Stat., ch. 56; By-laws, sec. 1, art. 5; Ky. Stats., secs. 854, 857, 860, 861, 869; Cook on Corps. (4th ed.), vol. 1, secs. 267, 268, 271.
3. Any preference among members of a building and loan association is contrary to the genius of such an organization and therefore void. Rogers v. Rains, 100 Ky., 295; Thompson on Bldg. Assns. (2d ed.), sec. 129, p. 247; Bertsch v. Bldg. Co., 48 S. W. R., 954; Wall v. Society, 32 Fed. Rep., 273; Latimer v. Bldg. Co., 81 Fed. Rep., 776; Hohenshell v. Bldg. Co., 41 S. W. R., 948; Gibson v. Bldg. Co., 48 N. E. R., 580; Post v. Bldg. Co., 37 S. W. R., 216; Leahy v. Bldg. Co., 76 N. W. R., 625; Towle v. Bldg. Co., 75 Fed. Rep., 938; Rabbitt v. Wilcoxon, 72 N. W. R., 306; King v. Bldg. Co., 48 N. E. R., 677; Wierman v. Bldg. Co., 67 Ill., App., 550.

## CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In May, 1895, appellant became the owner of fifteen shares of paid-up stock, at \$100 per share, in the Globe Building & Loan Company—a building and loan association incorporated in February, 1891, under chapter 56 of the General Statutes. In July, 1897, the association conveyed its property to a trustee for the benefit of its creditors; and, in the action brought to settle the assigned estate, appellant presented her claim as a preferred one, having theretofore given a withdrawal notice as provided in the by-laws of the association. The chancellor overruled her contention, saying: "All stockholders will be paid equally in proportion to their respective payments for

stock, common and preferred alike. Both the preferred and common stockholders entered into a scheme which promised unusual profits from the lending of their money by the association at a much higher rate of interest than the law permitted them individually to charge. They believed that the association might legally do this, but it has been authoritatively decided to the contrary, and the company forced into insolvency by its liability for excessive interest collected by it.

"All the stockholders invested their money in an enterprise that is impossible of performance, because of the statute against usury. The formation of the company was induced by a mistake of law, which was shared in by all the stockholders, and which has brought on a misfortune common to all of them, because the enterprise contemplated by the articles of incorporation and by the stockholders could not mature. Under such a state of fact, each stockholder must bear his proportionate share of the burden, and he can not equitably claim a right to be paid in full at the expense of the other stockholders, who did nothing more nor less than make the same mistake of law."

We think the chancellor reached a correct conclusion. This court has recently announced, in *Reddick-Stofer's Appeal*, 20 Ky. Law Rep., 1720 [50 S. W., —], in *Sumrall v. Commercial Bldg Trust's Assignee*, 20 Ky. Law Rep., 1801, [50 S. W., 69], and in *Safety Building & Loan Co. v. Ecklar*, 20 Ky. Law Rep., 1770, [50 S. W., 50], that the underlying principles of such associations demand exact equality and mutuality among all their members; and certainly this is true when the members are all alike participants in a plan supposed by them to be legal, but which authorizes the exaction of usurious rates of interest. Apart from this, however, while we do not in-

timate that a different result would follow, there is in fact nothing whatever in the company's articles of incorporation authorizing the issuance of preferred stock; and there certainly is not in chapter 56, General Statutes, because the building and loan plan is not mentioned.

There is a by-law of the company to the following effect: "Paid-up stock may be withdrawn at any time after one year from date of certificate, and the holder thereof will receive the cost price of such stock, together with interest as follows: Forty-dollar stock, six per cent. per annum; fifty-five dollar stock, six per cent. per annum; seventy-five dollar stock, seven per cent. per annum, and one-hundred-dollar stock, eight per cent. per annum—for the full time. This stock will also participate in the net profits over and above the interest mentioned, and shall bear their proportion of expenses and losses." Another by-law, providing for the expense fund, fixes a limitation of eight cents per share per month upon installment stock, and six per cent. per annum on paid-up and pre-paid stock. The body of appellant's certificate of stock recites that, "as such stockholder," she "is a member of said company." On the back of this certificate is the following recital: "Terms and conditions: The Globe Building and Loan Company guarantees the prompt payment of the interest, as per the coupons, on the within certificate, and guarantees to redeem this certificate at face value at any time after twelve months from date of issue, provided 60 days' notice shall have been given. This stock shall not participate in the profits or losses of the company, but prompt payment of the principal and interest of this certificate shall be guaranteed by the entire assets of the company."

It is the contention of appellant's counsel that stock issued upon the foregoing conditions is stock only in name; that it is in fact a misnomer to call the certificate an evidence of stock; that the transaction is simply a borrowing and lending of money, and that the appellant is a creditor, not a stockholder or member, of the association; and that the borrowing of money is not an *ultra vires* act. "Every commercial body," say counsel, "whether an individual, partnership or corporation, must have the power to borrow money. Commerce means credit and credit means the power to borrow." We deem it necessary only to repeat, without elaboration, our conclusion heretofore stated—that the exercise of such powers is wholly foreign, to the design and purposes of such associations. *Stofer's Appeal* 20 Ky. Law Rep., 1720 [50 S. W., —]; *Safety B. & L. Assn. v. Ecklar*, 20 Ky. Law Rep., 1770; [50 S. W., 50]. In *Towle v. Building and Loan Co.*, 78 Fed., 688 it was said of such an association: "It can not borrow money, nor loan money, except such as is paid in by its members in the manner pointed out by the law, nor engage in any general business transactions. Its sole function is to consolidate the small savings of the many, and by a system of unified loans, secure advantages to each contributor that he could not, perhaps, individually obtain. To this process of consolidation, and of loaning out the gatherings thereof, and their collection again, with the interest thereon, for redistribution, with such incidental powers as are necessary to make the process effective, the authority of the corporation is strictly confined. The usefulness of such corporations, and their safety, depend upon strict limitation. To grant them, by judicial implication or intendment, a wider amplitude of power, would destroy the only safe assurance on which they are granted." Nor does

it follow that if the contract is declared *ultra vires* of the corporation, the holder of the preferred stock is to be declared a creditor of the association when insolvency intervenes. *Gibson v. Safety B. & L. Association*, 170 Ill., 44, [39 L. R. A., 202; 48 N. E., 580]. The effect of denying the preference does not invalidate the stock. *Cook on Corp.* (4th ed.), sec. 271. The only ground of appellant's claim presenting any sort of plausibility is that she has given notice of withdrawal; but this, we have seen in the recent appeal of *Stofer*, cited above, gives her no priority over other stockholders. It would be a singular co-operative mutual association that could give unequal privileges to its stockholders, or base their priorities on the question of diligence in giving notice. In respect to being purely co-operative and mutual, such associations are different from corporations generally. As said by Mr. Thompson in his work on *Building Associations* (2d ed., sec. 129): "The poor and illiterate classes were encouraged to support it, and it is poor policy that would subordinate their claims to a higher membership." In *Bertche v. B. & L. Co.*, [48 S. W., 954], the supreme court of Missouri said: "All members must participate equally in the profits, and bear the losses, if any, in the same proportion. \* \* The plainest principles of justice and honesty clearly forbid that one class of stockholders, equally meritorious, should be compelled to suffer, that others may profit thereby." In many of the courts of other States, while the fundamental principle of co-operation and equality is announced in forceful language, there seems to have been sanctioned a system of classification of stock into preferential groups wholly destructive of the principle announced. In our opinion, there can be no preference in stock among the members of a building and loan association. The judgment below is affirmed.

## CASE 33—CONSTRUCTION OF WILL—MARCH 22.

## Cooksey, Etc. v. Hill, Etc.

APPEAL FROM WARREN CIRCUIT COURT.

**DEVISES—CONSTRUCTION—"CHILDREN," DESIGNATING PURCHASERS.—**

Under the will of John R. Hill, which provided that his realty should be rented for five years to pay his debts and after that period a certain portion of same should be given to his daughter Eva to vest in her to her separate use, but in the event she should marry and die without children and leave a husband surviving her; then remainder over to the husband for and during his natural life with remainder to the testator's son, Bradley, if living, or, if dead, to his children, if any; or, if none, then to the grandson of the testator, Joe Smith; or, if the said daughter should die leaving children, then the land should go to the said children, the child of said Eva surviving her and living beyond the five-year renting period provided for in the will, took as purchaser under the will of his grandfather; and upon his death his brothers and sisters of the half-blood inherited the land to the exclusion (first) of the testator's son, Bradley, and (second) of the devisees of his daughter, Eva.

**MITCHELL & DUBOSE FOR THE APPELLANTS.**

1. Dying without issue or children held to refer to death at any time. *Hart v. Thompson*, 3 B. M., 488; *Moore v. Moore*, 12 B. M., 660; *McKay v. Merrifield*, 14 B. M., 260; *Harris v. Berry*, 7 Bush, 114; *Montgomery v. Montgomery*, 11 Ky. Law Rep., 88; *Varble, Jr., v. Phillips*, 14 Ky. Law Rep., 364.
2. The testator makes one disposition of the estate in case his daughter dies without children, and another if she dies leaving children. This admits of but one possible solution—that he was providing for a successor upon her death, whenever it occurred. *Deboe v. Lowen*, 8 B. M., 623; *McNair v. Kawking*, 4 Bibb., 390; *Carroll v. Carroll*, 12 B. M., 642; *Chrystie v. Phye*, 19 N. Y., 344; *Vanderzée v. Singerland*, 103 N. Y., 47; *O'Mahoney v. Burdett*, 7 L. R., 386.
3. That the testator did not intend the quality of the estate de-

Cooksey, &c., v. Hill, &c.

- vised his daughter to be of one kind if she married and died within the first-year renting time, is shown by the extrinsic facts, the literal meaning of the words, the matter under consideration, the context, and the devise to her children. *Wren v. Hynes*, 2 Met., 132; *Barclay v. Dupuy*, 6 B. M., 98; *Allen v. Farthing*, 2 Mad., 310; *Child v. Giblett*, 3 My. & M., 71; *Cooper v. Cooper*, 1 K. & L., 658.
4. It is certainly incumbent on appellees to show from the subject matter of the devise, or its purposes and objects, or the context or other provisions of the will that the words employed are not to be understood in their plain, literal meaning. *Williamson v. Williamson*, 18 B. M., 377; *Jarman's Rules*.
  5. The fact that the testator did not foresee all the consequences of his disposition is not reason for varying the plain meaning of the words. *Jarman's Rules*; *Moon v. Stone*, 19 Grattan, 326.
  6. A direction by the testator that the lands shall be rented for five years for the purpose of obtaining money to pay the indebtedness did not create another estate, nor defer the descent of title nor possession of the lands to the devisees. *Bowling v. Dobyns*, 5 Dana, 440; *Hughes v. Hughes*, 12 B. M., 115.
  7. In other portions of the will the testator clearly created estates, the final vestiture of title to which would remain contingent for many years, why may we not assume such was his intention in the devise under consideration? *Barclay v. Dupuy*, 6 B. M., 98; *Wren v. Hynes*, 2 Met., 132.
  8. There can be no separate estate in the absence of the conjugal tie. *Duke's Hrs. v. Duke's Devisees*, 81 Ky., 312.
  9. Rules of construction must give way to the intention of the testator; they are to be used as lamps to illuminate the way; not bars to prevent the intention of the testator from being carried out. *Wills v. Wills*, 85 Ky., 486.
  10. The estate devised the daughter was limited by an executory devise to her children, if she left any surviving.

EDWARD W. HINES ON SAME SIDE.

1. The will vests title in the daughter, the fee subject to defeat by marriage and death leaving either husband or children.
2. To make the words "should die leaving children" in the devise to his daughter Eva, refer to a dying within the five years renting period, would be to deprive the whole clause of its natural meaning, would be inconsistent with other provisions of the will.



and would fall altogether to explain why there was a gift-over upon Eva's death after marriage and no provision for some one to take in the event of her death before marriage and no gift-over upon Bradley's death. *Wellford v. Snyder*, 137 U. S., 521.

3. The rule is that if there is a devise to a class with a gift-over to the survivors in the event of the death, to one or a class without issue, the gift-over will take effect only in the event of the death in the life-time of testator or before the termination of the particular estate if there be one. *Birney v. Richardson*, 5 Dana, 424; *Pool v. Benning*, 9 B. M., 623. The case of *Thackston v. Watson*, 84 Ky., 206, seems to have overlooked the fact that the rule was restricted to a devise to a class. On this distinction, 3 *Jarman on Wills*, ch. 47-8-9; 29 *Am. & Eng. Ency. of Law*, 486, 494, 502; *Pruitt v. Holland*, 92 Ky., 641; *Wills v. Wills*, 86 Ky., 486; the case of *Hoods, &c., v. Dawson*, 17 Ky. Law Rep., 880, and *Crozler, &c., v. Cundall, &c.*, 18 Ky. Law Rep., 116, illustrate the rule which applies where there is a gift-over in the event of death coupled with a contingency, the former being a case where there was a gift-over upon the death of a remainderman without issue, and the latter a case where there was no intervening particular estate. The distinction between the case of *Wills v. Wills* and the case at bar is this—in the latter the words relating to death are always coupled with other contingencies, while in the former case they were not, the expression there being simply "in case of the death."

LEWIS McQUOWN FOR APPELLEE HILL.

1. A devise to one and his children, if he had any, created a fee, and not life estate. *Bradley v. Skillman*, 3 Ky. Law Rep., 734; *Deboe v. Lowen*, 8 B. M., 624; *Wills v. Wills*, 85 Ky., 486.
2. The words dying with, or without issue, mean, where the devise is direct and immediate, death in the life-time of the testator; but where the distribution or possession of the estate is postponed during a particular estate, then the dying means death after that of the testator and before the expiration of the particular estate. *Birney v. Richardson*, 5 Dana, 424; *Wills v. Wills*, 85 Ky., 486; *Martin v. Renaker*, 10 Ky. Law Rep., 469; *Trabue v. Terry*, 10 Ky. Law Rep., 345; *Cornwall v. Falls City Bank*, 92 Ky., 381; *Pruitt v. Holland*, 92 Ky., 641; *Ferguson v. Thomason*, 87 Ky., 519; *Wilson v. Bryan*, 90 Ky., 482; *Duncan v. Kennedy*, 9 Bush, 580; *Hughes v. Hughes*, 12 B. M., 115; *Webster*

Cooksey, &c., v. Hill, &c.

v. Webster, 15 Ky. Law Rep., 97; Scott v. Best, 15 Ky. Law Rep., 795.

3. Where there is a clear gift, it can not be cut down by anything subsequent, unless the intention to do so clearly appears. Ranfield v. Ranfield, 8 H. L. Cas., 235.

GRIDER & MOSS FOR APPELLEE SMITH.

1. At the time of the death of Eva Hill Cooksey she was the absolute owner of the land with fee simple title thereto and Clinton Hill Cooksey at his mother's death became the owner of said land devised from his mother and not by virtue of his grandfather's will and by the provisions of section 1401, Kentucky Statutes (Clinton Hill Cooksey dying in infancy), said land descended to his kindred upon his mother's side that is to his mother's brother, H. Bradley Hill, and to his mother's nephews, Joseph H. Smith, a moiety each. These conclusions follow from the following propositions which are the result of the various decisions in this State:

(a) That when an estate is given by will, which may be defeated upon the happening of a contingency, and there is no other period apparent, in which the event shall occur, it shall refer to an event happening within the life-time of the testator.

(b) If it is apparent from the context of the will that an event was referred to as occurring after the life-time of the testator, and an intermediate estate intervened before the first devisee should come into possession, it should be construed as referring to an event happening after the death of the testator, and before the devisee came into possession.

(c) The contingency will not be referred to the happening of an event at an indefinite time, however remote, unless the will plainly shows on its face that this was the testator's intention; especially when there are other prior periods to which the contingency could apply as shown in the will.

Citations: Birney v. Richardson, 5 Dana, 424; Pool v. Benning, 9 B. M., 623; Hughes v. Hughes, 12 B. M., 115; Duncan, &c., v. Kennedy, &c., 9 Bush, 580; Parish, &c., v. Vaughan, &c., 12 Bush, 97; Wren v. Hynes' Admr., 2 Met., 129; Strossman, *ex parte*, 6 Ky. Law Rep., 738; Martin v. Renaker, &c., 10 Ky. Law Rep., 469, 345, 563; Thackston v. Watson, 84 Ky., 210; Wills v. Wills, 85 Ky., 492; Pruitt v. Holland, 13 Ky. Law Rep., 867; Webster's Trustee v. Webster, &c., 15 Ky. Law Rep., 97.

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Cooksey, &c., v. Hill, &c.

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WRIGHT & McELROY ALSO FOR THE APPELLEE, J. H. SMITH.

There is nothing in the will showing that the testator intended to limit his daughter Eva to an estate for life, but it was the obvious purpose of the testator that she should take a fee simple. *Wills v. Wills*, 85 Ky., 486; *Jarman on Wills*, vol. 2, p. 752-3 (5th ed.); *Hughes v. Hughes*, 12 B. M., 116; *Wren v. Hynes' Admr.*, 2 Met., 129; *Birney v. Richardson*, 5 Dana, 432.

W. S. PRYOR FOR APPELLEE IN A PETITION FOR A REHEARING. (LEWIS McQUOWN OF COUNSEL.)

It was not the purpose of the testator to confine his daughter Eva to a life estate in the land devised to her. If the estate in Eva was a defeasible fee, the title must necessarily remain in Eva, and never was divested because she died leaving children. See *Wills v. Wills*, 85 Ky., 486; *Deboe v. Lowen*, 8 B. M., 620; *Crozier v. Cundall*, 99 Ky., 202.

EDWARD W. HINES FOR APPELLANT IN RESPONSE TO THE PETITION FOR A REHEARING.

A fee may be created subject to be defeated upon marriage. *Wellford v. Snyder*, 137 U. S., 524; and such a provision is neither against public policy nor unreasonable.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

The will of John R. Hill, after reciting that he was weak in body, providing for the sale of his personalty, with some reservations for his wife and daughter, and using certain expressions, which indicated his expectation of death in the near future, provided as follows:

"Item 7th. It is further my will and I give to my grandson, Joseph Smith, son of Charles and my deceased daughter, Lelia Smith, the tract or parcel of land which I purchased at commissioner's sale of the land of B. C. Smith, deceased, containing about one hundred and twenty-six acres, and enough of other of my lands adjoining said one hundred and twenty-six acres as will make, including the one hundred and twenty-six acres, one hundred and thirty acres. . . . and if my said grandson Joseph Smith should

die before his father, Charles Smith, without children, then in that event, and I so will, that Charles Smith, his father, shall have said lands during his natural life, and at his (Charles Smith's) death said lands to revert to my son, Bradley, and my daughter, Eva, equally. If either one of them should not be living without any children, then the whole to go to the survivor; and, if both be dead leaving children, then said lands to go to their children; and, if said Eva, Bradley and Joseph Smith should all die without heirs of their body, then I desire, after the life estate of Charles Smith in said one hundred and thirty acres of land, shall, in that event, go and descend to my next kin.

"Item 8th. It is further my will and I give to my beloved wife, Addie, one-third in value of the remainder of the lands, after taking out the one hundred and thirty acres above mentioned, including the house and garden and out-houses, for and during her natural life, and at her death to be equally divided between my two children, Bradley and Eva.

"Item 8th. It is further my will and I give to each one of my said children, Eva and Bradley, all the balance of my lands equally.

"Item 9th. It is further my will, and I so direct, that the lands which I have given as above to my said daughter, Eva, shall vest in her, for her separate use and benefit, free from any husband she may have; but in the event she should marry and die without any children, and leave a husband surviving her, then I desire that such husband shall have the lands so given as above to said Eva for and during his natural life, and at his death to go to my son Bradley, if living; or, if he be dead, then to his children, if any, and, if none, then to my grandson Jo

Smith; but, if my said daughter should die leaving children, then I desire same to go to said children; but if it should so turn out that said grandson, Joseph Smith, should get said lands, and he should die without child or children, then I direct that said lands go to the next of my kin.

"Item 10th. It is further my will, and I so direct, that before any of the lands before mentioned shall be divided I desire, and so direct, that all of the same shall be rented out for the space of five years, for the purpose of raising a sufficient amount of money to pay all of my just debts that may remain after the proceeds of the personal property shall be applied thereto, except the house, and about five acres for garden purposes, for my wife and family, but out of the proceeds of said renting a sufficiency shall be applied for the comfortable support and maintenance of my beloved wife and daughter, Eva, during said five years."

His wife, his son and daughter—of age and unmarried—and his grandson, Jo Smith, survived him. The will was probated in October, 1879. In 1881, Eva was married to George C. Cooksey, who had four children—the appellants in this case—by a former marriage. Cooksey died in 1886, and Eva in 1889, leaving one child, Clinton Hill Cooksey, who died in 1895. It appears, therefore, that both Eva and her son survived the five years renting period provided for by the will. By last will, Eva Cooksey devised the land she took under her father's will to her son, Clinton. This suit was brought by Bradley Hill, the testator's son, claiming that under the will of John R. Hill, Eva took a fee-simple estate in the lands after the expiration of the five-year period; that her will operated to vest the estate in her son, Clinton; and that he having died in infancy, and the property having come to him by devise from his mother, it descended to Bradley Hill as next of kin, under section 1401, Kentucky Statutes.

Jo Smith, the grandson of testator and nephew of Bradley and Eva, was made defendant, and set up his claim to an undivided one-half of the property, as next of kin on the mother's side.

The appellants, who are brothers and sisters of the half blood, filed an answer and counterclaim, claiming that Clinton did not take the land by inheritance from his mother, nor as devisee under her will, but became entitled by purchase under the will of his grandfather, and that as next of kin they inherited the land from him, and were entitled to its possession; as section 1401 applies only to real estate derived by gift, devise, or descent from one of the parents.

On demurrer to the answer and counterclaim, the chancellor held that Eva took an estate in fee, under her father's will, and that Clinton took title under his mother's, and not his grandfather's will, and that, as next of kin to the mother, to whom, under statute cited, the estate would pass, Bradley Hill and Jo Smith shared equally.

The question for decision is whether the will of John R. Hill passed an absolute fee to his daughter, Eva, in her share of the land, or a lesser estate; and this depends upon the intent of the testator, to be gathered from the entire will.

A number of cases have been cited on behalf of appellee in support of a general rule of construction claimed by him to exist. But, as said in the case of *Wills v. Wills*, 85 Ky., 492, [3 S. W., 902], quoting from *Hughes v. Hughes*, 12 B. Mon., 115: "The application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will." It is contended for appellee that this court has frequently held the words

"dying without issue" and similar expressions in wills to refer to the death of the devisee before that of the testator, or during the existence of some particular estate provided for, upon the expiration of which the devise was to take effect, and there are a number of cases that support this contention. But in the case at bar a number of expressions are used which, in our judgment, render the construction contended for by appellee impossible.

It seems conceded by both sides that one of the controlling motives with the testator was to insure that part of his property which he devised to his daughter and his grandson being enjoyed by those of his own blood, and this desire upon his part is manifest from the numerous provisos inserted in the instrument to take effect upon the happening of various contingencies. He seems to have had confidence in the business ability of his son, and gave him an absolute fee in his share. He provided liberally for his grandson, the son of his deceased daughter, and, in the event of his (the grandson's) death before his father (the testator's son-in-law) without children, giving to the son-in-law an estate for life, with the further provision that at his death it should revert to Bradley and Eva. Clearly, the contingency upon which the remainder to the son-in-law was to take effect was the death of the grandson without children before Charles Smith's death, whenever that might happen; then there is remainder to Bradley and Eva; and, if either one of them should not be living (at the death of Charles Smith), the whole to go to the survivor; then, if both be dead, leaving children (at Charles Smith's death), the land to go to their children. And then it is provided that if Eva, Bradley, and Joseph should all die, without heirs of their bodies, before the death of

Charles Smith, the land was to go to the testator's next of kin, after Charles Smith's life estate should expire.

It will readily be seen, from an examination of item seventh, that the testator was providing for a number of contingencies which might occur a long time after his death, and that there was no common period fixed by the will to which we may refer the taking effect of the various remainders. This appears also by item eighth, where the land devised to the wife for life was, at her death, to be equally divided between his two children. By the second item eighth he provided for an equal division of the residue of his lands between his two children. No restriction whatever was placed upon the devise to Bradley, but restrictions were, by item ninth, placed upon the share devised to Eva, and it is to obtain a proper construction of these restrictions that this suit is brought.

First, he provides that her share shall be separate estate, in the event of her marriage. Then he provides for two contingencies: First, the contingency that she should marry and die without children, leaving a husband. In that event, "then" the husband was to have Eva's share of the land for life, and, at his death, to go to Bradley for life, or, if he should be dead, "then" to his children, if any, and, if none, "then" to the grandson, Jo Smith. It is claimed by appellant that this contingency of marriage, death without children, and a surviving husband, as well as the other contingencies, was to occur within the five-year period provided for by item tenth. It will be observed that the remainder provided for in the first part of item ninth is not predicated upon a certainty, as in the case where the phrase was, *in case she die*, but upon a contingency which may or may not happen. And so of the other contingency provided for, viz., if his daughter should die leaving chil-



dren, "*then*" the land was to go to the children, without limitation. But if it so turned out that the grandson, Joseph Smith, should get the lands, and he should die without child or children "*then*" the lands were to go to the testator's next of kin. It seems reasonably evident that, in the event she died childless, with a surviving husband, he did not desire her to have the power to devise the land away from his blood.

It is true that our construction of his intent will result in the lands going to those not of his blood, a result which he doubtless would have provided against but for the rule against perpetuities. But "the fact that the testator did not foresee all the consequences of his disposition is not a reason for varying it." Jarman, rule XIII. He provided against that result happening through the action of any of his descendants, so far as he had power to control the devolution of his estate.

We can not concur with counsel for appellee that item tenth was intended by the testator to fix a period within which the contingencies provided for were to take place, in order to give effect to the remainders over, or that it was intended to do anything more than provide a means of paying his debts—for the payment of which his personalty was insufficient—without impairing his landed estate, which he seems to have desired to go to his devisees intact.

Still less can we reach the conclusion that the devise over was intended to have reference to the death of Eva before the testator. The expressions used in the will indicating the expectation of early dissolution forbid such a conclusion. He makes provision for such contingencies as "If I should die before the time of selling hogs;" "before time to sow wheat;" "before time to kill hogs for next year,"—indicating that he had in contemplation his death soon after the publication of his will.

Again, it seems highly improbable that he intended to provide for her potential husband in the event she should marry and die without any children during the five-years renting period, but intended to make no provision for her husband in case that event happened immediately after the expiration of the five years; or that he intended to secure an estate to her children if she died during the five years leaving children, but to make no provision for them in case her death, leaving children, occurred after that period. The manifest purpose of the testator was to secure the land for the maintenance of his daughter during her life, and that it should go to her children on her death, provided she left children.

The case is argued on behalf of appellee upon the theory that Eva necessarily took either a life estate or a fee simple. This, however is not correct. It will be observed that one contingency is not provided for, viz., her death unmarried and childless. And this leads us to the conclusion that the provision made by the second item eighth, giving the residue of the land equally to Bradley and Eva, is restricted by the provisions of item ninth, as to the land devised to Eva, into a defeasible fee, subject to be divested upon the happening of either of two events—First, her death at any time without children, leaving a surviving husband; and, second, her death at any time leaving children. But in the event of her dying unmarried and childless, no restriction was placed upon the language used in the second item eighth, and the fee would become absolute in her, and her heirs at law or devisees would take from her, and not by virtue of the testator's will. *Wellford v. Snyder*, 137 U. S., 521, [11 Sup. Ct., 183].

It is unnecessary, therefore, to discuss the cases which hold that, in the absence of controlling language indicating

a different intent, such phrases as "dying without issue," should be construed as referring to death in the lifetime of the testator; for, as we have seen, the will now under consideration contains controlling language indicating a different intent.

We think the case of *Deboe v. Lowen*, 8 B. Mon., 616, relied on by counsel for each side, is in point. In that case the testator directed that, after the death of his wife, his land not before disposed of should be equally divided between seven of his children, the division being made sooner if any of them wanted their part after marriage or attaining the age of twenty-one; that his son James was to have his part when he wanted it; and, "if he dies without heirs, it is my will that it goes to my children who are single now, and to Benjamin, my son; should he die with heirs, I will the land to said heir or heirs of my son James."

Said the court through Chief Justice Marshall: "And as the first devise to the seven is sufficient to give to each a fee simple, though there are no words of inheritance, and the devise over is on the contingency of any one dying without issue living at his death, we are of opinion that according to the case of *Pells v. Brown*, (Cro. James, 590), each one took a fee defeasible on that contingency, and not otherwise,"—referring to *Hart v. Thompson's heirs*, 3 B. Mon., 486. And again, after referring to the fact that in no case of a will made since the abolition of entails had the court inferred the intention to create an estate tail, or construed the devise as creating one contrary to the intention, because the words "dying without issue" were used (citing numerous cases), the court said: "But when the testator makes one disposition in case James dies without heirs, and in the same sentence makes another disposition in case he dies with heirs, we think it too evident to ad-

mit of question that the contingency upon which each disposition depends refers to the time of his death, and must be then determined. Whatever has been said of the phrase, 'if he dies without heirs or issue,' as being satisfied by a failure of his issue at any time after his death, we suppose the clause, 'if he dies with heirs I will said land to said heir or heirs,' admits of but one possible solution, and must necessarily be confined to the time of his death."

In this case the court held that James took a defeasible fee, subject to be divested upon his death without heirs of his body living at the time of his death; but as he left heirs it was held that the use of the word "heirs" instead of "children" created an estate tail, under the rule in Shelley's Case, which, under our statute, became a fee simple, and enabled him, by his conveyance, to bar his issue.

We deem it unnecessary to quote from the authorities further than to refer to the case of Crozier v. Cundall, 99 Ky., 202, [35 S. W., 546], where in one clause language was used which, unrestricted, would have given the fee simple of two of the testator's daughters, but in a subsequent clause it was provided that, if either of them "should die without bodily issue, then such portion of my estate as is devised to them shall revert back to, and be equally divided between the rest of my children and the children of those who are dead"; and it was held to pass a defeasible fee, subject to be defeated by the death of the first taker at any time without leaving bodily issue—citing Thackston v. Watson, 84 Ky., 206; Birney v. Richardson, 5 Dana, 424; Pool v. Benning, 9 B. Mon., 623, and numerous other cases. For the reasons stated, the judgment is reversed, and cause remanded, with directions to set aside the judgment sustaining the demurrer to the answer and counterclaim, and for further proceedings consistent herewith.

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Hale v. Grogan.

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CASE 34—ON MOTION TO DISMISS—MARCH 23.

## Hale v. Grogan.

## APPEAL FROM CALLOWAY CIRCUIT COURT.

1. **APPEALS—ACT OF MARCH 14, 1898.**—An appeal granted by the clerk of this court after the act of March 14, 1898, went into effect, from a judgment rendered before the passage of that act is subject to the provisions of the act; and unless the amount exceeds \$200, exclusive of interest and costs, this court has no jurisdiction.
2. **SAME "EXCLUSIVE OF INTEREST."**—The language of the act, "exclusive of interest," excludes interest which accrued prior to the rendition of the judgment.

On February 15, 1899, on motion of appellee, the appeal was dismissed; and afterwards came W. S. PRYOR and moved the court to set aside the order of dismissal, and on his motion argued:

If the judgment had been for the plaintiff it would have been for more than \$200, and this judgment would have borne interest; and it is the interest accruing after judgment that the statute excludes. Besides, the principal of the notes sued on exceeds \$200, and the payments made did not amount to as much as the interest.

Citations: N. C. & St. L. R. R. v. Mattingly, 40 S. W. R., 673; Johnson v. Louisville, 11 Bush, 532; Bracy v. Bracy's Admr., 12 Bush, 154.

**ROBBINS & THOMAS AND GREER & REED AGAINST THE MOTION TO SET ASIDE THE ORDER OF DISMISSAL.**

1. The appeal granted below prior to the act of March 14, 1898, was abandoned.
2. The language "exclusive of interest" means interest accrued at the time of the judgment.

Citations: Donaldson v. The Security Trust & Safety Vault Co., 20 Ky. Law Rep., 857; Tailor v. Shawley, 2 Ky. Law Rep., 217; Kendall v. Spradling, 15 B. Mon., 33; Jones' Executor v. Finnell, 8 Bush, 25; *Ex parte* McCandle, 7 Wallace, 506; Cooley's Const. Lim., 474.

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The judgment appealed from in this case was rendered on November 18, 1897, and the appellant (who was the plaintiff below, and whose petition was dismissed) prayed and was granted an appeal in the lower court. Had he perfected that appeal by filing his transcript within the time allowed by law, his appeal would not have been affected by the act of March 14, 1898, which took effect June 10th thereafter, as was held by this court in the case of *Donaldson v. The Security T. & V. Co.*, 20 Ky. L. R., 857, [47 S. W., 763]. However, he abandoned that appeal, and was granted one by the clerk of this court on October 7, 1898; and this appeal moves to dismiss, for the reason that this court has no jurisdiction of it, because the amount in controversy is less than \$200, exclusive of interest and costs.

The first question, therefore, is: Had this court, on October 7, 1898, jurisdiction of appeals from judgments theretofore rendered, when the amount in controversy, exclusive of interest and costs, was less than \$200? We think the statute then in force answers the question in the negative: "No appeal shall be taken to the court of appeals from a judgment for the recovery of money or personal property if the value in controversy, be less than \$200 exclusive of interest and costs, nor to reverse a judgment of divorce," etc. After this law took effect, this court had no jurisdiction to entertain an appeal taken from any judgment wherein the amount in controversy was less than the minimum sum fixed in the law. The law was adopted in March, 1898, but did not take effect for ninety days thereafter, and all litigants were thus given an opportunity to save whatever privileges they had in respect to appeals from judgments rendered before the law took effect.

In a similar act, that of February 10, 1880, which chang-

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Hale v. Grogan.

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ed the minimum jurisdiction from \$50 to \$100, there was a provision exempting from its operation all pending appeals, and all appeals afterwards taken from judgments rendered before the passage of the act. There is no such exemption here, and we must presume the Legislature intentionally omitted to provide for any exception. It is well settled that the right of appeal is a mere privilege, and not a vested right. "As such, it pertains to the remedy, and may be modified, abolished, or revised by the Legislature at discretion." 2 Enc. Pl. & Prac. 19.

The remaining question is: Is the "value in controversy less than \$200, exclusive of interest and costs?" Several years before the suit was brought, the plaintiff's debt (two notes) amounted to less than \$200 on its face, after applying certain admitted payments theretofore made,—the calculation being in the usual way where partial payments are made. This principal, however, and interest computed thereon from the last partial payment until the date of the institution of the suit, make some \$281; and the plaintiff asks judgment for this specific sum in the prayer of his petition. A trial on the issues presented resulted in a verdict for the defendant (appellee), on which a judgment was duly rendered. It is from that judgment this appeal is prosecuted.

It is the contention of appellant that the amount or value in controversy is the sum of \$281 as shown by the prayer of his petition; and this is undoubtedly true. But this sum is not the amount in controversy unless interest is included. The petition sets out the notes, with all the payments, and it is admitted that, unless interest is computed on the notes from the time of the last payments on them up to the bringing of the suit, the sum in dispute is less than \$200. The plaintiff might have so framed his

prayer (and it is not unusual to do so) as to ask for judgment for the face of his note less the credits, with interest thereon from their date; but he chose to adopt perhaps the better plan, and make the calculation himself. We do not think the particular method a plaintiff may adopt in framing his prayer in cases of this kind can affect the question of jurisdiction. In view of the statute excluding interest from consideration, the principal of the debt is the controlling factor in fixing the value in controversy.

If the statute controlling the jurisdiction of this court fixed the minimum jurisdiction at a certain amount, "exclusive of costs," the contention of counsel would be tenable. The Revised Statutes of 1852 fixed the court's minimum jurisdiction at \$100 *exclusive of interest and costs*; but afterwards the Civil Code of 1854 fixed the jurisdiction at \$100, *exclusive of costs*. And suit was brought on a note for \$60.46, with some 14 years' interest thereon, and, the trial resulting in a judgment for the defendant, the plaintiff brought his appeal to this court. On the question of jurisdiction, this court, in an opinion by Judge Simpson, in *Orth & Wallace v. Clutz's Adm'r*, 18 B. Mon., 224, held that "the interest upon the debt constituted a part of the matter in controversy, and as it, as well as the costs, had been expressly excluded by the Revised Statutes from the computation of the amount necessary to give jurisdiction to this court, and as the costs *only* are excluded by the provisions of the Code of Practice, the rational presumption is that the *interest* was not intended to be excluded." The court further said: "Now, as the jurisdiction of the court was regulated by the provisions of the Code, the Revised Statutes on the same subject, having been previously adopted, were repealed by the Code, and are no longer in force. We are *therefore* of opinion that the interest due upon the debt at



the time the action was commenced constituted a part of the amount in controversy." And the jurisdiction was upheld. The reasoning of the court in that case leads irresistibly to the conclusion that the *interest* referred to, in the expression "exclusive of interest and costs," in the Revised Statutes (and, we may say, in all statutes of like import), is the interest prior to the institution of the suit, and that, if the court had been controlled by that statute, instead of by the provisions of the Code, the interest on the note of \$60.46 accruing before the suit was brought, and making a total of over \$100, would have been *excluded* in arriving at the amount in controversy.

It is hard to see what interest is excluded by the expression, unless it is the interest accruing before judgment. When the statute excludes *costs only*, the interest accruing on the judgment is not estimated in fixing the jurisdiction, in any of the courts, when this expression, "exclusive of costs," is used. Thus in *Knapp v. Banks*, 2 How. 73, and a long line of cases in the Supreme Court of the United States, it is held that the interest accruing on the judgment before the writ of error is sued out, can not be taken into consideration in estimating the matter in dispute, although the statutes regulating the subject require the exclusion of costs only. In *New York El. R. Co. v. Fifth Nat. Bank*, 118 U. S. 608, [7 Sup. Ct., 23], there was a verdict in the lower court for \$5,000. The minimum amount of the appellate jurisdiction was any sum or value "more than \$5,000, exclusive of costs." But before judgment was entered upon the verdict some days elapsed, and a judgment was finally entered for \$5,068. The court took jurisdiction, saying that the interest accrued *before judgment*, and not *after* the judgment. To the same effect was the case of *The Patapsco*, 12 Wall., 451, where the decree was

for \$1,982, and interest thereon from the date of a report theretofore made, which made more than \$2,000 due at the time of the decree, that sum being then the jurisdictional limit. If, therefore, when nothing about interest is said in the statute fixing appellate jurisdiction, the courts have uniformly excluded all interest on the judgment, it must follow that, if any force at all is given the expression "*exclusive of interest*," we must hold it to refer to "interest prior to the judgment."

The same rule applies to the defendant. If the judgment had been for the plaintiff in the sum prayed for, the amount in controversy, as to the defendant, would have been the sum of \$281, but the amount in controversy, *exclusive of interest*, would have been only about \$135, and no appeal would lie, or, if taken on the judgment, would have been dismissed on motion; the record disclosing that the amount in controversy was less than \$200, *exclusive of interest and costs*.

The case of *Bracy v. Bracy's Adm'r*, 12 Bush, 154, supposed by counsel to be precisely in point, was decided under a provision of the statute giving the court jurisdiction where the amount in controversy was "fifty dollars *exclusive of costs*," and jurisdiction of the appeal was taken on the ground that the amount of the demand below was \$53.32, consisting of the principal sum of \$45, and of \$8.32 interest. The interest was held to be a part of the amount in controversy. That case is in accord with the cases cited above, and in no way conflicts with our conclusion. The motion to dismiss is sustained.

## CASE 35—ACTION ON IMPLIED CONTRACT—MARCH 23.

106 317  
127 784

## Schuster v. White's Administrator.

## APPEAL FROM KENTON CIRCUIT COURT.

*Res Adjudicata*.—A judgment dismissing an action for board is no bar to a subsequent action between the same parties for services rendered the defendant for nursing and having washing done for her, the former action requiring an express contract under the statute, and the latter an implied contract only.

## M. L. HARBESON FOR THE APPELLANT.

1. Under section 2178 Kentucky Statutes, as construed in the case of *Thomas v. Arthur*, 7 Bush, 245, an express contract must be alleged and proven, but a recovery for nursing, care, attention, etc., could be had upon an implied contract. It devolves upon the party who pleads in bar to allege definitely and prove a state of facts constituting the bar and if the cause of action for nursing, care and attention arose out of the same contract as that for board, the defendant must have alleged and proved it.
2. The opinion of the court upon a former appeal is the law in this case, and this court can not now reconsider or decide differently questions raised and determined on the former appeal. *Jenkins v. Headley's Exrs.*, 19 Ky. Law Rep., 290.

## O'HARA &amp; ROUSE FOR APPELLEE.

The claim for board and that for nursing, attention and washing arose out of the same transaction and consequently the judgment in the former case is a bar to the action in this.

## JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this case, and the opinion delivered on the former appeal is found in 19 Ky. Law Rep., 1861, [44 S. W., 959]. The issues were not clearly shown by the pleadings which had been filed before the former appeal, as they are now shown by the subsequent pleadings and the testimony offered on the trial. The judgment which was pleaded in bar was

on a claim for *boarding* the intestate from January 18, 1892, until her death. The claim for board was presented as a set-off in an action by the appellee on a note which the appellant had executed to his intestate. It appears from the second paragraph of the appellant's reply to the second amended answer (and the facts averred in it are taken as true on the demurrer which the court sustained thereto) that the plaintiff failed to recover on that set-off because it was a suit for board, and the express contract alleged as the basis of the action was not proven. This court has held, unless an express contract be proven, there can be no recovery for furnishing board, save by a keeper of a tavern or a house of private entertainment; this being the interpretation which the court gave to a statute similar to section 2178, Kentucky Statutes.

This action is brought upon an *implied* contract claimed to exist by reason of the fact that the intestate, being ill, and needing and desiring nursing and attention necessary for such an invalid, had herself conveyed to the residence of the plaintiff; and, from that time until her death, he, at her special instance and request, rendered and furnished such nursing and attention, and had done for her necessary washing, etc.

The question presented for our consideration is, is the judgment which was rendered, dismissing the appellant's set-off for boarding a bar to this action? The services were rendered during some period for which the claim for boarding had been asserted. There is no claim asserted in this action for boarding the intestate. Neither was there a claim presented in the former action for nursing, etc., and having washing done for her. The former cause of action was based on an alleged express contract for board-

ing or dieting the intestate. This action is on an implied contract for services rendered the invalid, etc.

Under the pleadings in the former action, the court could not have permitted the appellant to prove the cause of action upon which recovery is sought here, because it was a distinct cause of action from that pleaded and relied upon by way of set-off. To have enabled the plaintiff to recover on his set-off for boarding, it was necessary for his witnesses to have proven an express contract; but this court, in *Thomas v. Arthur*, 7 Bush, 245, held that a recovery for nursing, attention, etc., can be had upon an implied contract.

In the first action the testimony of the witnesses would have been confined to the question of express contract, and as to what was a reasonable price for the board, if the amount had not been fixed by the terms of the contract. On the cause of action averred in this case, the testimony of the witnesses should be confined to the question as to whether the services had been rendered, and their value. There is an identity of persons, but not of subject-matter and cause of action. The evidence was essential to have sustained the former cause of action would not sustain the present cause of action. Neither would that which was essential to establish a present cause of action have sustained a former cause of action.

In *Freedman on Judgments*, Sec. 259, it is said: "The best and most invariable test as to whether a former judgment is a bar, is to inquire whether the same evidence will sustain both the present and the former action. . . ."

The doctrine of the law of *res judicata* has never been applied so as to compel one person having a distinct cause of action against another to join them in one action because the two causes of action were of such character that,

under the Code or law, their joinder would have been permissible.

In *Cromwell v. County of Sac*, 94 U. S., 351, Judge Field was discussing the doctrine of *res judicata*, and said: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops, not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. . . .

"But, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to

the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This opinion is written as an extension of the former opinion of the court in this case on the subject of the doctrine of the law of *res judicata* as applied to the facts as they have been developed by the pleadings and proof in this case since the former appeal, but not as a modification of the former opinion. The pleadings were such on the former appeal (the case having gone off on demurrer) as not to fully present the issue for adjudication as under their record.

The court should have overruled the demurrer to the second paragraph of the plaintiff's reply to the second amended answer; and, instead of instructing the jury to find for the defendant, it should have submitted the issues, under proper instructions to the jury. The judgment is reversed for proceedings consistent with this opinion.

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CASE 36—INDICTMENT FOR HOMICIDE—MARCH 24.

Wade v. Commonwealth.

APPEAL FROM GRANT CIRCUIT COURT.

1. CRIMINAL LAW—RIGHT TO WAIVE KEEPING JURORS TOGETHER.—The right to have accepted jurors kept together in charge of the sheriff in a felony case is a statutory and not a constitutional right and may be waived by the defendant.
2. SAME—INSTRUCTIONS—SELF-DEFENSE.—An instruction on the subject of self-defense in a homicide case that "if they shall further believe from all the evidence herein that the accused, at the time he shot and killed said Pepler, had reasonable grounds

## Wade v. Commonwealth.

to believe, and did believe, from all the circumstances as they appeared to him, that the said Pepler was then and there about to take his life, or inflict upon his person some great bodily harm, he had a right to use any means at his command that were to him apparently necessary" is not erroneous to the prejudice of defendant by reason of the use of the words "from all the circumstances as they appeared to him."

3. SAME—EVIDENCE.—It was competent for the Commonwealth to show as bearing on the question of malice that the deceased and defendant had a quarrel over some whisky a few hours before the killing.

## W. W. DICKERSON FOR APPELLANT.

1. The court erred in refusing to discharge the jury. Crim. Code, sec. 244; and this error could not be waived. *French v. Com.*, 18 Ky. Law Rep., 575.
2. The instruction on the subject of self-defense was unduly qualified.
3. The court admitted incompetent evidence.

## W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR APPELLEE.

1. The error in the formation of the jury was waived. *Pierson v. People*, 79 N. Y., 424; *Thompson on Trials*, vol. 1, p. 115.
2. The instruction on self-defense was not prejudicial, and was substantially in the form usually given. *Sackett's Instructions to Juries*, p. 528.
3. The evidence complained of was competent to show malice.

## JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

Appellant, having been convicted of manslaughter, and sentenced to eighteen years' imprisonment in the penitentiary, seeks reversal in this court.

After seven jurors had been accepted by the Commonwealth and placed in the box, the court adjourned for dinner, cautioning the jurors who had been accepted not to talk to any one, or permit any one to talk to them, about the case, but omitting to provide that the jury should be kept together. The jury went at large during the dinner hour. Upon the reassembling of the court, defendant



moved to discharge the seven jurors, upon the ground that they had not been kept together; and the trial judge said that his failure to act in that behalf was through inadvertence, and that he would sustain the motion, whereupon defendant's counsel withdrew the motion. Five other jurors were then selected and placed in the box, and the defendant then moved to discharge the twelve jurors, upon the ground that the seven jurors who had not been kept together were among the number, which motion was overruled by the court, upon the ground that defendant had waived his right in that behalf by withdrawing his former motion. Undoubtedly, if he had the power to waive his objection to the seven jurors, he did so by his action in this case.

But it is earnestly contended by counsel for appellant that this was a right which he could not waive, and the rulings of the court upon the question of waiver of jury trial, or consent to be tried by eleven jurors, are relied upon. Those cases, however, do not seem to us to apply to the case at bar. The right to a trial by jury—which is construed to mean a trial by a jury of twelve men—is a constitutional one, and this court, whether right or wrong, has held it to be a right which can not be waived. It has not, so far as we are informed, been so decided as to any merely statutory right, where no prejudice is shown to have resulted to the accused. We are of opinion that the right to have the jury kept together was one which he might waive, and that he did so in this instance. *Pierson v. People*, 79 N. Y., 424. [35 Am. R., 524].

It is further complained that the instruction as to self-defense was erroneous. That instruction was in the usual form, except that the words italicized below were inserted: “ . . . Yet, if they shall further believe, from all the

evidence herein, that the accused, at the time he shot and killed said Pepler, had reasonable grounds to believe, and did believe, *from all the circumstances as they appeared to him*, that the said Pepler was then and there about to take his life, or inflict upon his person some great bodily harm, he had a right to use any means at his command that were to him apparently necessary," etc., etc. It is suggested that, by the instruction that if the accused believed, *from all the circumstances*, that his life was in danger, etc., the jury were restricted in their consideration of the evidence as to whether his life was in danger, or whether he had reasonable grounds to so believe, and that threats previously made were withdrawn from their consideration. We do not so regard it. The phrase complained of is an extremely broad one, and, while not customarily used in such instructions in this Commonwealth, is frequently used in the self-defense instructions in other States, and seems to us—if it can be assumed to make any change in the meaning of the instruction—to tend rather to the advantage of the accused. Sackett's Instructions to Juries, p. 528.

It appears from defendant's own testimony that he had been accused by the deceased of stealing whisky, and complaint is made in the brief that the Commonwealth introduced testimony concerning the theft of the whisky. But an examination of the record does not show that the Commonwealth introduced any testimony upon that subject, but simply that, a few hours previous to the killing, a quarrel took place between the two men about some whisky; and this was clearly competent, as tending to show malice. Moreover, the testimony as to the altercation was beneficial to appellant, as it showed that, some two hours before the killing, the deceased, with a knife in his hand, started at appellant, and then took off his coat, and offered

Latonia Agr. and Stock Assn. v. Donnelly, Tax Collector, &c.

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to fight. It did not appear, from the testimony of the Commonwealth, that any charge of theft had ever been made against appellant.

Certain other testimony complained of in the brief does not appear in the record. For the reasons stated, the judgment is affirmed.

The whole court sitting.

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CASE 37—INJUNCTION AGAINST FRANCHISE TAX—MARCH 25.

Latonia Agricultural and Stock Association  
v. Donnelly, Tax Collector, Etc.

APPEAL FROM KENTON CIRCUIT COURT.

**REVENUE AND TAXATION—FRANCHISE TAX—SPECIAL PRIVILEGE.**—The power to sell, or permit to be sold, on its grounds pools on any and all races that may be run or trotted thereon is a "special and exclusive privilege or franchise not allowed by law to natural persons" within the meaning of section 4077 of the Kentucky Statutes, and subjects the corporation owning it to the payment of a franchise tax.

**M. L. HARBESON IN A BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANT.**

The appellant is not liable for franchise tax under section 4077 of the Kentucky Statutes; either (1) because the section embraces all corporations, or (2) because it is of the same kind as the enumerated corporations, or (3) because it enjoys exclusive privileges.

Citations: Ky. Stats., secs. 4077-4078; W. U. Telegraph Co. v. Norman, 77 Fed. Rep., 20; Corrigan v. Coney Island Jockey Club, 2 Delhanty, (N. J.), 512; 2d ed. Am. & Eng. Ency. of L. vol. 7, p. 638; Emdlich on Int. of Stat., sec. 405; Ramsay v. Gould, 57 Barb. (N. Y.), 398; Elliott on Private Corporations, secs. 7 and 8; Morawetz on Corporations (2d ed.), sec. 3; 8 Am. & Eng. Ency. of Law, 588.

Latonia Agr. and Stock Assn. v. Donnelly, Tax Collector, &c.

ROBERT C. SIMMONS FOR APPELLEE.

1. Sections 4077-4078 of the Kentucky Statutes embrace all corporations; but if not,
2. The appellant exercises special and exclusive franchises.

Citations: Ky. Stats., secs. 4077-4091, 4020, 573, 339, sub-sec. 6; Genl. Stat., ch. 56, sec. 7; W. U. Telegraph Co. v. Norman, 77 Fed. Rep., 13; Morawetz on Corporations, sec. 411 (2d ed.); Beach on Private Corporations, vol. 1, sec. 372; act April 24, 1882; ———

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

The appellant seeks to enjoin, in this action, the collection of taxes upon its franchise assessed by the board of valuation and assessment for the year 1897, pursuant to the provisions of section 4077 of the Kentucky Statutes, which provides: "Every railway company or corporation, and every incorporated bank, trust company, guarantee or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised."

Appellant exists by virtue of a special charter granted by the Legislature, which confers upon it, in addition to the usual and ordinary powers granted to private

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Latonia Agr. and Stock Assn. v. Donnelly, Tax Collector, &c.

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corporations, the right of perpetual existence, and authority to acquire not exceeding 200 acres of land; and by the fourth section of its charter it is provided that "the association may lay out upon its grounds a track or tracks, course or courses for running or trotting races, and may conduct such races and award such stakes, premiums or purses as it may determine; and it may sell or permit to be sold on its grounds pools on any and all races that may be run or trotted upon its course or grounds."

Appellant is not among the enumerated corporations liable to a franchise tax, nor can it be said to be a like company, corporation, or association to any of those therein designated; and it is liable for the payment of the tax in question, if at all, by virtue of the fact that they have or exercise a special or exclusive privilege or franchise not allowed by law to natural persons.

The chief power and business granted to the appellant by the terms of its charter is the right to conduct a race course, and sell pools on all races that may be run or trotted upon its course. The right to sell pools or permit them to be sold is an important and valuable adjunct to the business which plaintiff is authorized to conduct, and is doubtless a source of considerable profit to it; and without this privilege, in all probability, it would be unable to profitably conduct the enterprise in which it is engaged.

The first question to be determined is whether this is a special and exclusive privilege or franchise not allowed by law to natural persons. The right to sell pools, and in fact simple gaming, without any objectionable accompaniments, was not ordinarily punishable at common law. See 1 Bishop's New Law, p. 1135. But in this State there are statutes making it an offense, either general, or under

*Latonia Agr. and Stock Assn. v. Donnelly, Tax Collector, &c.*

special circumstances. "Every contract, conveyance, transfer, or assurance, for the consideration, in whole or in part, of money, property, or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property, or other thing lent or advanced for the purpose of gaming, or lent or advanced at the time of any betting, gaming, or wagering to a person then actually engaged in betting, gaming or wagering, shall be void." Kentucky Statutes, sec. 1955.

And section 1956 provides for the recovery of the money paid by the loser from the winner thereof, or any transferee of the winner having notice of the consideration, by suit within five years after the payment, transfer, or delivery. By section 1960 the setting up of any machine or contrivance used in betting, whereby money or other thing is won or lost, is made a felony; but by section 1961 it is provided that the provisions of section 1960 shall not apply to persons who sell combination or French pools on any regular race track during the races thereon.

We are of opinion that this provision of appellant's charter legalizes the sale of pools made by it, or under its authority, on its grounds, and protects it against the civil liability denounced by the statute against natural persons who are engaged in the same or similar occupations; and it therefore becomes and is a valuable, special, and exclusive privilege, within the meaning of the statute, and renders appellant liable for the payment of the franchise tax provided by the statute.

In view of the conclusion which we have reached on this point, it will be unnecessary to consider other suggestions made by counsel for appellees as to appellant's liability. For reasons indicated, the judgment is affirmed.

Central Railway and Bridge Co., &c., v. Com. Same v. Same.

CASE 38—ACTION FOR FRANCHISE TAX—MARCH 25.

Central Railway and Bridge Co., Etc. v. Commonwealth.  
Same v. Same.

106	329
128	275
128	276

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. ACTION FOR TAXES.—Under section 4171 of the Kentucky Statutes an action may be maintained for franchise taxes payable directly into the State treasury.
2. SAME—PENALTY.—In the absence of any claim of error in the assessment, or tender of taxes due upon an assessment which had been reduced on the appellant's motion, the lower court did not err in rendering judgment for the statutory penalty.

C. J. AND W. W. HELM FOR APPELLANT.

1. Without express legislative authority, a suit can not be maintained by the Commonwealth to recover taxes. Baldwin v. Hewitt, Auditor, 88 Ky., 673; Louisville Water Co. v. Com., 89 Ky., 244; Same v. Same, 18 Ky. Law Rep., 2.
2. There is no statute authorizing a suit by the Commonwealth to recover franchise taxes. Genl. Stats., Edition of 1887, Revenue and Taxation; Ky. Stats.,—Revenue and Taxation; acts 1889-90, vol. 1, p. 149; Louisville Water Co. v. Com., 18 Ky. Law Rep., 2.
3. Penalties for non-payment of taxes should not be adjudged when the original assessment was erroneous, and a new or corrected assessment was made, pending the suit.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER  
FOR APPELLEE.

On jurisdiction: Ky. Stats., secs. 4182, 4171, 4091.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The opinion delivered in February 15, 1899, is withdrawn.  
By these actions the Commonwealth of Kentucky seeks  
to recover from the appellant, Central Railway & Bridge

Central Railway and Bridge Co., &c., v. Com. Same v. Same.

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Company, the amount of taxes due on its franchise for the years of 1896 and 1897.

The principal question for review on these appeals is as to the right of the Commonwealth to maintain an action to recover the taxes. In other words, is there any law authorizing the maintenance of such an action? It has been adjudged in *Baldwin v. Hewitt*, Auditor, 88 Ky., 678 [11 S. W., 803], and *Louisville Water Co. v. The Commonwealth of Kentucky*, 89 Ky., 244, [12 S. W., 300], that, in the absence of express legislative authority, taxes can not be recovered by suit.

Section 4182, Kentucky Statutes, does not aid any in determining whether or not there is any law authorizing these actions to be brought. That section simply confers upon the Franklin circuit court jurisdiction of such actions as are authorized by law to be brought to enforce the collection of taxes.

If the right to maintain the actions exists, it is under section 4171, Kentucky Statutes, which reads as follows: "Suits and motions against sheriffs, clerks, or against them and their securities on their official bond, or their heirs, devisees or representatives, and all other persons required to pay money into the State Treasury or to do any other act required by law to be done connected with the payment of money into the State Treasury after it has been collected, may be instituted in the Franklin Circuit Court, and prosecuted as prescribed by law."

The title to the article in which the foregoing section appears is as follows: "Collection of taxes and other public money by action." For the purpose of this inquiry the title may be read as follows: "Collection of taxes—by action." That part of the section which is relied upon for authority to maintain these actions, reads as follows:



"Suits—against—all other persons required to pay money into the State Treasury,—may be instituted in the Franklin Circuit Court, and prosecuted as prescribed by law." The title of the article indicates the purpose the Legislature had in view in enacting section 4171, Kentucky Statutes. We conclude that the actions can be maintained under section 4171, Kentucky Statutes, as under section 4086, Id., taxes imposed on franchises are made payable directly to the treasurer of the State by the corporation. It does not appear in this record that the appellant refused to pay its taxes because of any error in the assessment. No such defense was made. Upon motion of the plaintiff, the assessed value of the appellant's franchise was reduced. Its default in the payment of taxes does not appear to have resulted from an error in the assessment; nor that it ever endeavored to have such error corrected and was refused; nor did it tender the tax on the value of the franchise as fixed by the corrected assessment. The court did not err in adjudging the penalty imposed by the statute. The judgment is affirmed.

Ashland & Catlettsburg Street Railway Co. v. Faulkner.

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CASE 39—ACTION FOR DAMAGES—MARCH 26.

Ashland & Catlettsburg Street Railway Co.  
v. Faulkner.

APPEAL FROM BOYD CIRCUIT COURT.

1. DAMAGES—ELECTRIC CAR LINES ON HIGHWAY.—The owner of a lot abutting on a highway outside of a municipality is entitled to recover damages from an electric railroad company which has constructed a track in front of his lot tending to obstruct the free access to same.
2. SAME—APPROPRIATION OF PLAINTIFF'S LAND.—The question of whether the defendant actually appropriated any part of plaintiff's land for its track and the resulting damage, if it did so, was properly submitted to the jury, the evidence being conflicting.
3. SAME—EXCESSIVE DAMAGES.—A verdict for \$665 in such a case is held by the court to be excessive in view of the evidence that the measure of obstruction and consequential damage is inconsiderable.

R. C. BURNS FOR THE APPELLANT.

1. A street railway is but an improved means of using a public highway, and no right of action exists in favor of an abutting property owner against it for damages unless some unnecessary injury is done to ingress and egress. It was, therefore, error to instruct the jury that if the appellant interfered with appellee's means of ingress to and egress from his said land to find for the appellee. Any occupation by a street railway of a public highway would of necessity interfere to some extent with the ingress to and egress from abutting property, but it is a lawful interference.
2. In the third instruction the measure of damages is not correctly set out. If the building and operation of the road upon the appellee's lot was a trespass, the measure of damages would be the value of the property taken and the injury done to the land by the entry.

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Ashland & Catlettsburg Street Railway Co. v. Faulkner.

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3. The fourth instruction was also erroneous. It should have required the jury to ascertain the fair market value of the property just before it became generally known the street railway would be built and its value immediately after it was built and deduct the latter from the former, the difference being the measure of damages.

Citations: Elliott on Roads, 529, 530; Cooley's Const. Lim., 556; Eichels v. Evansville St. Ry. Co., 78 Ind., 261; Mills v. Parlin, 106 Ill., 60; Smith v. Pt. Pleasant & C. R. R. Co., 23 W. Va., 451; Fulton v. S. R. R. T. Co., 85 Ky., 640; L. & O. R. R. Co. v. Applegate, &c.; 2 Am. & Eng. R. R. Cases, 437, 440; 97 Ill., 506; 17 Am. & Eng. R. R. Cases, 163, 184; 30 Ohio St., 604; Louisville Bagging Mfg. Co. v. Cent. P. Ry. Co., 23 S. W. R., 592; Civil Code, 321; 3 Mar., 397; 1 Bibb., 400; 3 Mon., 415; 8 Dana, 298, 306; Lunsburg v. San Antonio R. T. St. Ry., 30 S. W. R., 533; Cumberland Tel. & Teleg. Co. v. United Electric Ry. Co., 29 S. W. R., 104; L. & N. R. R. Co. v. Orr., 91 Ky., 116.

**JAMES ANDREW SCOTT FOR THE APPELLEE. (L. T. EVERETT AND BROWN & BROWN OF COUNSEL.)**

1. The refusal of the lower court to split up the cause of action and have two suits—one for trespass and the other for obstruction of ingress and egress—was proper. Henderson v. McClain, opinion filed December 9, 1897; Smith v. Bogenschutz, 14 Ky. Law Rep., 305.
2. The jury were the sole judges of the weight of the evidence, and if there was any evidence upon which to base the verdict, to disturb it would be an invasion of the rights of the jury.
3. It was not misconduct on the part of the jury to make a measurement of the premises. A measurement by tape line is no more irregular than a measurement by the eye.
4. The special judge Proctor K. Malin, had no right to sign the bill of exceptions at a term of the court subsequent to that during which he was elected. Childers v. Little, 16 Ky. Law Rep., 521.

**EVERETT AND BROWN & BROWN ON THE SAME SIDE.**

The grant of the right of way to the appellant was invalid, and being invalid because in contravention of section 164 of the new constitution, the appellant was a tortfeasor and had no right to, and can not, justify an interference with the possession of another whether rightfully or wrongfully.

**Ashland & Catlettsburg Street Railway Co. v. Faulkner.**

**JAMES ANDREW SCOTT FOR THE APPELLEE IN A PETITION AND SUPPLEMENTAL PETITION FOR A REHEARING. (BROWN & BROWN AND R. S. DINKLE OF COUNSEL.**

Citations: *City of Henderson v. McClain*, 19 Ky. Law Rep., 1450; *Louisville Bagging Co. v. Central Passenger Ry. Co.*, 95 Ky., 50; 44 Iowa, 11; 18 Ore., 237; 62 N. Y., 386; *Cooley's Con. Lim.*, 683; 67 Ill., 507; *Elliott on Roads and Streets*, 303; 107 Ill., 507; 111 Pa. St., 35; 26 Conn., 249; *E. L. & B. S. R. Co. v. Combs*, 10 Bush, 382; *Booth on Street Railways*, sec. 94; *Keasbey on Electric Wires*, note 1, sec. 7, p. 97; same, sec. 27; 14 Ohio St., 524; 38 Ohio St., 41; 82 Ga., 320; 45 Kan., 264; 34 Mo., 259; 38 Mich., 262; 87 Mich., 361; 44 Iowa, 11; *Holloway v. L. St. L. T. R. R. Co.*, 13 Ky. Law Rep., 481; *Lewis v. Jones*, 1 Barr., 336; *Chess v. Manown*, 3 Watts, 219; *Chambers v. Fury*, 1 Yates, 167; 3 Wright, 340; *Botts, &c., v. Simpsonville & Buck Creek Tp. Co.*, 98 Ky., 55; *Morawetz on Corporations*, sec. 197; *Thompson on Corporations*, sec. 343; *Cook on Stock and Stockholders*, sec. 905; *Covington Short-Route Transfer Ry. Co. v. Piel*, 87 Ky., 267.

**R. C. BURNS FOR THE APPELLANT IN A RESPONSE TO THE PETITION FOR REHEARING.**

Citations: *Dillons Munic. Corps.* (3d ed.), secs. 701, 742; *Killinger v. Forty-second S. F. R. Co.*, 50 N. Y., 206; *Louisville Bagging Mfg. Co. v. Cen. Pass. Ry. Co.*, 95 Ky., 50; *Rafferty v. Central Traction Co.*, 147 Pa., 579; *Williams v. Railway Co.*, 46 Fed. Rep., 556; *Briscom v. Railway Co.*, 79 Maine, 363; *Patterson St. Ry. Co. v. Grundy*, 56 Am. & Eng. R. R. Cases, 456 (Sup. Ct. New Jersey); *City of Henderson v. McClain*, 19 Ky. Law Rep., 167; *Zehren v. M. E. Ry. Co.*, 75 Wis., 111; *Ky. State Con.*, sec. 242; *Rigney v. Chicago*, 102 Ill., 64; *Chicago v. Taylor*, 125 U. S., 162; *Ky. Acts.*, 1873, vol. 1, 516; *E. L. & B. S. Ry. Co. v. A. & C. St. Ry. Co.*, 96 Ky., 347; 162 Pa. St., 275; *Reading v. Davis*, 153 Pa., 360; *McDewitt v. Peoples Nat. Gas Co.*, 160 Pa., 367; 27 L. R. A., 767; *Jaynes v. Railway Co. (Neb.)*, 74 N. W. R., 67; *Booth on Electric Railways*, secs. 83-54-75-76; *Detroit St. Ry. Co. v. Mills*, 85 Mich., 634; *Koch v. North Av. Ry. Co.*, 23 Atl. Rep., 463; *Patterson v. St. Ry. Co.*, 83 Mich., 285; *Barber v. Sagman Union St. Ry. Co.*, 83 Mich., 299; *Halsey v. Rapid Transit Ry. Co.*, 20 Atl. Rep., 859; *Mt. Adams & Eden Park Inland Ry. Co.*,

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Ashland & Catlettsburg Street Railway Co. v. Faulkner.

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22 W. L. B., 67; *Simmons v. Toledo*, 5 Ohio C. Ct. Rep., 424; *Cincinnati, &c., Ry. Co. v. City & Suburban Telephone Co.*, 48 Ohio St., 390; s. c. 27 N. E. R., 890; *Lockhart v. Craig St. Ry. Co.*, 139 Pa. St., 419; s. c. 21 Atl. Rep., 26; *Com. v. West Chester*, 9 Pa. Cr. Ct. R., 542; *Rafferty v. Central Traction Co.*, 1 Atl. Rep., 419; *Taggart v. Newport, St. Ry. Co.*, 16 R. I., 669; s. c. 19 Atl. Rep., 326; *William v. City Electric St. Ry. Co.*, 41 Fed., 556; *Ogden Cy. Ry. Co. v. Ogden Cy.*, 26 Pac. Rep., 288; *Plack v. Union Depot Ry. Co.*, 41 S. W. R., 915; *Cosby v. O. & R. R. Co.*, 10 Bush, 288.

## JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

This suit was instituted by appellee against appellant, the Ashland & Catlettsburg Street-Railway Company, for damages arising from the location and operation of its road. He claims to be the owner of a lot of ground fronting the Ashland & Catlettsburg turnpike road, on which he had erected a frame building forty-two feet long and sixteen feet wide, in which he did business as a saloon keeper; that, in the construction of the building, he had left an intervening space of about ten feet between the front of the building and his property line on the east side of the turnpike road, and that, for the convenience of his patrons, he had constructed in this open space a well, put up a water trough, and laid down a platform 10x16 feet, on which wagons and other vehicles could stand when stopping in front of his saloon; that, as a result of these conveniences, his business was rendered profitable from the patronage of travelers upon this highway; that the appellant, forcibly and without right, took possession of a portion of that part of his lot which was next to and adjoining the turnpike road, and had built and was operating an electric street-car line thereon. And, by the second paragraph in his petition, he alleges that appellant had wrongfully constructed its line of street railway on the turnpike

road, so close to his property as to obstruct his ingress and egress from his property to the public highway.

It will be observed that the appellee seeks damages—First, for the illegal appropriation of a part of his lot; and, second, damages which result from building the street railway on the land of the turnpike company so close to his building as to materially injure his use of the turnpike. Pleadings being made up, the trial of the case resulted, under instructions given to the jury, in a verdict for appellee for \$665, the basis of the recovery being both elements of damages enumerated above; and we are asked to reverse that judgment.

The court, on motion of plaintiff, instructed the jury, first, that “if they believed from the evidence that the plaintiff, John Faulkner, was the owner and in possession of the property in controversy, and that the defendant, the Ashland & Catlettsburg Street-Railway Company, while plaintiff was the owner and in the possession of said property, by its officers, agents, or employes, entered upon said property, and constructed its line of street railway in front thereof on said property, the law is for the plaintiff, and the jury will so find.” And, in fixing the measure of compensation under the state of case contemplated in the first instruction, the jury were told by instruction No. 3 that. “if they believed as in instruction No. 1, they will find from the evidence the market value of the entire tract of land just before it became generally known that the street railway was to be constructed in front of it, and find the value of the ground taken and occupied by it for all the purposes for which it was adapted, and to this sum they will add the amount, if any, they believe from the evidence the remainder of the tract is diminished by reason of the construction and operation of defendant’s road.”

On the issues raised by the second paragraph, the court instructed the jury that "if they did not believe from the evidence, and find as in instruction No. 1, but believed from the evidence that the defendant constructed its track upon the Ashland & Catlettsburg Turnpike Road, so close to plaintiff's property as to unreasonably interfere with the ingress and egress to and from said property, the law is for the plaintiff, and the jury will so find."

And in defining the measure of compensation, if they found the facts to be as set out in instruction No. 2, they were told to find from the evidence the value of plaintiff's property just before it became generally known that the defendant's railway was to be located in front of plaintiff's property, and then determine what proportion of the value is taken from the property by reason of the construction and operation of defendant's road, and such proportion would be the amount of damage.

The proof in the record shows that the east rail of the street-railway track is about seven feet from appellee's building; that the track at that point was laid down at grade on the road, and that the only elevation was the height of the rails, two or three inches; that the road between the rails was ballasted with gravel; that a crossing of three-inch plank was put on each side of the track, twelve or fifteen feet long, making a good crossing where wagons and other vehicles could pass over or be backed in across the track at that point to appellee's house from the turnpike road on the west side of the railway track; and that appellant's road was built on the east side of the turnpike road. There is no proof which conduces to show that the approach to appellee's property has been interfered with by the building of the road, except

by its proximity to the building, and that it is a new use of the street at that point, which, in some degree, interferes with appellee's use.

The question before us, therefore, is, was there such obstruction as to authorize recovery on this branch of the case? If the diminution in the value of appellee's property arose solely by reason of the location of the road in front of his property, this of itself furnishes no ground of complaint, as the whole trend of modern authorities is to the effect that the operation of a street railway is a legitimate use of the highway, and an exercise of the public right of travel. They are but a means of using the public streets to a greater advantage for the very purpose for which they were laid out, and are recognized as the best and cheapest mode yet devised of getting about in a city, and do not impose any new or additional burdens for which abutters are entitled to compensation, unless they be so constructed as to deprive the abutter of some easement, or in some way cause him special damage for which he is entitled to recover, as they do not hinder the use of the rest of the street for the public travel, and in but a very small degree obstruct travel on the part occupied by their tracks. (See Wood on Railroads, 748, and authorities there cited, and Elliott on Railroads, vol. 3, 1635.) On this point Judge Dillon says: "The appropriation of a street for a horse railway, and used in the ordinary mode, is such a use as falls within the purposes for which the street was dedicated or acquired under the power of eminent domain." (Dillon's Municipal Corporations, (3d. Ed.), Sec. 722). Judge Cooley says: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all the ordinary purposes of a town street, not merely for the purposes to which such streets were formerly applied, but those de-



manded by new improvements and new wants. Among these purposes is the use for carriages which run upon a grooved track; and the preparation of important streets in the cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but is almost as much a matter of course as the grading and paving." Cooley, Const. Lim., 556.

As early as 1872 this question was thoroughly considered by the Court of Appeals of New York in the case of Killinger v. 42d Street St. Ry. Co., 50 N. Y., 206. In that case the plaintiff alleged that the track of defendant's road was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises, and depreciate its rental value. The court held that "abutting owners have an easement in the street, in common with the whole people, to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of action."

The Supreme Court of Pennsylvania has also thoroughly considered this question in the case of Rafferty v. Central Traction Co., 147 Pa. St., 579 [30 Am. St. R., 763; 23 Atl., 884.] This was an injunction suit to prevent the laying of rails on a street in such proximity to the curb as to interfere with the ingress and egress of the abutting property holders, and the rights of such property holders were exhaustively discussed by the court. It was claimed by the plaintiffs that their right of free access to their property along the street was interfered with because vehicles could not stand between the tracks and the curbing without interfering with the cars. It was held that "the right of the property holder is not changed in this respect. He has the same right after the tracks are laid as he had

before. It is a right which must be exercised in reason, whether there are car tracks on the street or not. In no circumstances does it confer the privilege of obstruction by unreasonable use, but the reasonable exercise of the right gives the street car company no right to arrest it;" the court finally holding that "the operation of a street railway by electricity is not an additional servitude or burden on the land which will entitle the owner of property abutting on the street to compensation, either by injunction for damages by the construction and maintenance of such a track. . . . If at any time, the owner of property abutting on the street has occasion for the presence of vehicles in front of his property on the street to take away or deliver persons or goods, he may exercise that right for such reasonable time as is necessary for his purpose; and if, in the exercise of such right, the passage of street cars is impeded, the street cars must wait."

In the case of *Williams v. Railway Co.*, 41 Fed. Rep., 556, the court said: "The operation of a street railway by mechanical power is not an additional servitude or burden on land already dedicated or condemned to the use of a public street, and is therefore not a taking of private property, but is a modern and improved use of the street as a public highway, and affords to the abutting property holder, though he may owe the fee of the street, no legal ground of complaint."

In the case of *Briggs v. Railroad Co.*, 79 Me., 363, [1 Am. St. R., 316; 10 Atl., 47], the court said: "We do not think any construction and operation of a street railway in a street is a new and different use of the land from its use as a highway. The laying down of rails in the street and the running of street cars over them for the accommodation of persons desiring to travel on the street is only

a later mode of using the land as a way—using it for the very purpose for which it was originally taken.”

In the case of *Patterson St. Ry. Co. v. Grundy*, 56 Am. & Eng. R. R. Cases, 456 [26 Atl., 788], the Supreme Court of New Jersey held that “abutting owners’ rights in a street in front of their property are subservient, unless such use imposes an additional servitude upon the land taken by the street or the abutting land; but when a public use, authorized by law, takes no property of the individual merely affecting him by proximity, the necessary interference with his business or the enjoyment of his property occasioned by such use furnishes no basis for damages.”

In the case of *Detroit Street Railway Co. v. Mills* (Mich.), 46 Am. & Eng. R. R. Cases, 616 [48 N. W., 1011], the court held that “street railways, when constructed so as not to interfere with the rights of others upon the streets, form no obstruction to such use and enjoyment. They make no more noise than the omnibus and other heavy vehicles, are not more dangerous, and no more interfere with access to the abutting lots. They constitute a modern and improved use only of the street as a public way;” holding that the abutting property owner would not be entitled to compensation for such use, in the absence of a statute giving it or plain proof of such injury.

In the case of *Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co.*, 95 Ky., 50, [44 Am. St. R., 203, 23 S. W., 592], this court said: “It is well settled that the use of a public street for travel and transportation by means of railway cars falls within the purposes for which streets are dedicated; and it is only when other ways of travel and transportation are prevented or unreasonably obstructed that courts can interfere to either enjoin or limit the oper-

ation of railroads upon a public street. . . . The trolley system of operating street cars, when properly adjusted, is not much, if any, more dangerous than horse power. . . . Moreover, while street-railway cars thus operated go at a greater rate of speed, and are more comfortable, and must in time become a cheaper mode of travel, they can be easier controlled than horse cars, and do not really more obstruct the street or interfere with business transacted thereon."

This question has been so exhaustively discussed, both in cases and text-books, as to leave but little to be said; and the rule is that a street railway may be placed and operated upon any part of a public street of a municipal corporation which is used by vehicles without increasing the burden of the servitude, and the owner of the fee is not entitled to compensation because of such use of the street upon which his property abuts merely because he is affected by the proximity of the tracks to his property, without proof of special damage resulting therefrom.

It does not appear that there was such obstruction of appellee's use of the public highway in front of his house by the railway as would justify recovery, if, as a matter of fact, the railway was built entirely upon the turnpike road. While it is true that there is not sufficient room between the tracks and the house of appellee for wagons and other vehicles to stand as they formerly did, there is nothing to hinder vehicles from being driven across the tracks at that point, or standing on the space between the rails, as cars pass there only at intervals of ten or fifteen minutes. Most of the witnesses who testify on this point state that there was no diminution whatever in the salable value of appellee's property resulting from the operation of the road, and no witness except appellee himself fixes

the damages as high as the verdict of the jury. The verdict is excessive, and palpably against the weight of the evidence, and the proof did not authorize the submission to the jury of the questions of fact embraced in instructions Nos. 2 and 4.

But upon the question as to whether appellant had appropriated, for the use of its track, land to which appellee actually held the legal title, the proof is conflicting, and, in our opinion, this issue was properly submitted to the determination of the jury; but, as it is impossible to say how much the verdict of the jury may have been affected by the other question, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

JUDGE GUFFY DISSENTING, DELIVERED THE FOLLOWING OPINION:

The object of the suit instituted by appellee (plaintiff below) was to recover damages against defendant upon two grounds: First, that it had forcibly entered and taken possession of his property, and erected thereon a street-railway track; and second, had built the same so near to his property as to obstruct his ingress and egress to and from the turnpike road upon which his property fronted.

A trial resulted in a verdict and judgment in favor of plaintiff for \$665, and appellant appealed to this court, and this court, in an opinion by a majority, reversed the judgment appealed from. It seems to me that the majority opinion is not sustained by the law, and is so far-reaching in its effects upon the rights of property holders that I feel constrained to enter and file this dissenting opinion.

It seems to me that the reversal of the judgment was unauthorized for several reasons. The opinion in effect

decides that the railway as built does not interfere with the ingress or egress of appellee to and from the turnpike road, when in fact several witnesses testified that it did seriously obstruct the ingress and egress. One witness stated that vehicles could not be driven across the track of the railway without breaking them, and, while it may be true that appellant's proof was quite different, yet it was the province of the jury to weigh and determine as to the truth of the matter, and especially so in this case, for this record discloses that, upon motion of appellant, the jury were permitted to view the track and surroundings. It seems to me that the majority opinion is an invasion of the province of the jury as to the finding of facts, and will upon the next trial bar appellee's right to show and recover for the obstruction complained of. The majority opinion seems to proceed upon the idea that the building of a street railway is no new servitude imposed upon a street, and therefore abutting property owners can not recover anything resulting from injury to their property on account of the building of such railways, and certainly so unless such building practically destroys ingress and egress to and from the street.

Quite a number of authorities are cited in support of the opinion. I have examined most of them, and am unable to see that they support the opinion of the majority. Almost if not every one recognizes the law to be that, if the railway materially obstructs the ingress and egress, the property owner can recover. I think that all the authorities relied on in the opinion apply to cases in States having a different constitutional provision from that in our Constitution in regard to the taking of private property for public uses. It is a well-settled rule of law in this State that a party may have a perfect and legal right and title

to an easement, and, although it may not be exclusive of the public generally, yet he can no more be deprived of such right to such easement than he can be deprived of any other right.

The case referred to in the opinion of Louisville Bagging Mfg. Co. v. Central Pass. Ry. Co., 95 Ky., 50, [44 Am. St. R., 203; 23 S. W., 592], is not applicable in the case at bar. The main question in the case *supra* was whether the railway company should be enjoined from erecting an electric street car line which it was alleged, among other things, would prevent the bagging company from unloading vehicles by backing them up to and at right angles to the sidewalk. The court held that such loading and unloading would necessarily obstruct the proper use of the street for other vehicles, and, besides, is forbidden by city ordinance. It is further said in the case *supra*, that the plaintiff had signally failed to show that he had been unreasonably obstructed or hindered in his business, or that his rights had been illegally interfered with. No reference is made in the opinion *supra* to sections 164 nor 242 of the present Constitution, if, indeed, the present Constitution was in force at the commencement of the suit referred to above.

It is perfectly manifest to my mind that the majority opinion is in direct conflict with the opinion in the case of City of Henderson v. McClain 102 Ky., 402, [43 S. W., 701]. McClain recovered a judgment against the city of Henderson for injuries to his property resulting from street improvements. There was no physical taking of the property, nor was the work of improvement done in an unskillful manner, but the result of the improvement was to materially decrease the value of McClain's abutting lot. It

has often been decided by this court, under the former Constitution, that no recovery could be had in such cases.

Section 14 of the Constitution of 1850 says: "No person shall, for the same offense, be twice put in jeopardy of his life or limb; nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." The same provision is in section 13 of the bill of rights of the present Constitution. The first part of section 242 of the present Constitution reads as follows: "Municipal or other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid, before such taking, or paid or secured at the election of such corporation or individual before such injury or destruction."

This court, in case of *City of Henderson v. McClain*, *supra*, after reviewing the law as it existed prior to the adoption of the present Constitution, and as expounded by this court, and after referring to sections 242 and 13, quoted above, said: "The adoption of this section, in addition to the provisions of section 13, in our view undoubtedly indicated an intention to change the organic law of the State, and to abolish the requirement of the direct physical injury to the property in order to establish a claim for damages. The language used is that municipal corporations shall make just compensation for property taken, injured, or destroyed by them. The city undoubtedly has the right to take private property, having the right of eminent domain. It also has the undoubted right to improve the streets for the public use, in a proper manner, when thereto authorized by legislative authority. If,



however, in making the improvements, it takes, injuries, or destroys private property, compensation must be made, unless consent has been given. This exact question appears to have been decided in several of the States in which new Constitutions, containing similar provisions, have been adopted in recent years. In Illinois the old Constitution contained a provision similar to that contained in section 13 of our Constitution. By the Constitution of 1870 (article 2, sec. 13), the provision was made to read: 'Private property shall not be taken or damaged for public use, without just compensation.' And, while the rule under the former Constitution had been held as in the section quoted above from Dillon (section 722), it has been held in numerous cases that the new rule introduced by the present Constitution required compensation in all cases where it appears 'there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.'

"In *Rigney v. City of Chicago*, 102 Ill., 64, it was there held 'that the introduction of that word ["damages"], so far from being superfluous or accidental, indicated a deliberate purpose to make a change in the organic law of the State, and abolish the old test of direct physical injury to the corpus or subject of the property affected.' This doctrine was approved by the Supreme Court of the United States, in an opinion delivered by Mr. Justice Harlan, in the case of *City of Chicago v. Taylor*, 125 U. S., 162 [8 Sup. Ct., 820]. Referring to the *Rigney* case, he said: 'The conclusion there reached was that, under this constitu-

tional provision, a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character; that it does not require that the damage shall be caused by a trespass, or an actual physical invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party may recover. We regard that case as conclusive of this question. The case of Railroad Co. v. Reich, 101 Ill., 157, is in point on this question of damages; and the case of City of Chicago v. Union Bldg. Ass'n, 102 Ill., 379 [40 Am. R., 598], also reviews the authorities, and approves the doctrine in Rigney v. City of Chicago, *supra*.'

"In Missouri a similar constitutional provision has been adopted, and a similar construction given. Sheehy v. Railway Co., 94 Mo., 574, [4 Am. St. R., 396, 7 S. W., 579]. In Pennsylvania a constitutional provision was adopted in 1874, exactly similar to section 242 of our Constitution, which has been construed in Borough of New Brighton v. Peirsol, 107 Pa. St., 280, as the provision of the Illinois Constitution. In a number of other States which have adopted the same or similar constitutional provisions the courts have gone as far or further than the Illinois courts in permitting recovery for consequential damages in such cases. See Dill. Mun. Corp. (4th Ed.) secs. 990-995a, inclusive, and notes. We conclude that, under the averments of the petition in this case, admitted by the demurrer to be true, there was a right of recovery."

Several States have, of late years, inserted, in their Constitutions, provisions similar to section 242 of our Constitution. Section 8 of article 15 of the Constitution of Pennsylvania, adopted in 1874, provides that municipal

and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by their construction or enlargement of their works, etc.

The Supreme Court of Pennsylvania, in *Borough of New Brighton v. Peirsol*, 107 Pa. St., 283, discussed and construed the section of the Constitution aforesaid. Peirsol brought suit against New Brighton to recover damages for the injury caused to plaintiff's property abutting on Lock street by reason of a change of grade of said street, made after the plaintiff purchased his lot, and obtained a verdict for \$193. The court clearly recognized the importance of the change made by the Constitution of 1874. The concluding portion of the opinion is as follows: "The claim now is for change of grade made since the defendant in error purchased, and for damage sustained by work done since the adoption of the Constitution of 1874. Judgment affirmed."

The decision *supra* was rendered some time before the adoption of our present Constitution, and section 242 thereof is the same in substance as the section of the Constitution of Pennsylvania, before quoted; and it is a well-settled rule of construction that the framers of the present Constitution intended section 242 to mean and have the same effect given by the Supreme Court of Pennsylvania, in the case, *supra*, to section 8 of the Pennsylvania Constitution. The provision of the Constitution of Illinois adopted in 1848, in regard to the taking of private property for public use, was the same as section 13 of the present Constitution of this State; but in 1870 Illinois adopted a new Constitution, which provided that private property should not be taken or damaged for public use without just compensation.

In *Rigney v. City of Chicago*, 102 Ill., 75, the Supreme Court of Illinois, in a very elaborate opinion, discussed the rights and remedies of abutting property owners, and also discussed and construed the new Constitution of Illinois. Rigney sought to recover against the city of Chicago for injury to his property resulting from street improvements. The trial court dismissed his petition, and an intermediate court, called the "court of appeals," affirmed the judgment, and he appealed to the Supreme Court of the State.

The court, among other things said: "The position of appellee that the new Constitution was simply intended to conserve existing rights, and that, therefore, there can be no recovery in any case except where there has been an actual appropriation of, or physical injury to, the plaintiff's property, is founded in part upon certain expressions to be found in some of the cases which have arisen since the adoption of the new Constitution, which seems to recognize as still existing the old test that the injury must be direct and physical, where there has been no actual appropriation or taking of the property. It is hardly necessary to observe that that which is said in any case upon a matter not necessarily involved in the decision is not to be regarded as authoritative or binding. Such expressions can only be regarded as indicating the views of the members of the court, and particularly that of the writer of the opinion, upon a matter of which the court is not required to, and consequently can not judicially determine; and hence, while they are entitled to respectful consideration, they are never accepted as authoritative. An examination of the cases, it is believed, will clearly show that no express decision to that effect has ever been made; and, even if such a case could be found, it must have been made without due

consideration, and should not be followed, for to recognize such a rule would, in effect, as we have already shown, be to render inoperative a plain provision of the Constitution. . . . The question, then, recurs: What additional class of cases did the framers of the new Constitution intend to provide for which are not embraced in the old?

"While it is clear that the present Constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old Constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like will generally cause a direct depreciation in the value of neighboring property; yet that is clearly a case of *damnum absque injuria*. So, as to an obstruction in a public street, if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie.

"In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that, by reason of such disturbance, he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases; and we have no doubt it was the intention of the

Ashland & Catlettsburg Street Railway Co. v. Faulkner.

framers of the present Constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law.

"The English courts, in construing certain statutes providing compensation for injuries occasioned by public improvements, in which the language is substantially the same as that in our present Constitution, after a most thorough consideration of the question, lay down substantially the same rule here announced. *Chamberlin v. Railway Co.*, 2 Best & S., 605, 110 E. C. L., 605, 617; *Beckett v. Railway Co.*, L. R., 1 C. P., 241, on appeal, L. R., 3 C. P., 82; *McCarthy v. Board*, L. R., 7 C. P., 508. These statutes require compensation to be made where property was 'injuriously affected', which the English courts construe as synonymous with the word 'damaged.' *Hall v. Mayor, etc.*, L. R., 2 C. P., 322; *Railway Co. v. Gattke*, 3 MacN. & G., 155. The rule we have adopted was unanimously sustained by the House of Lords in the *McCarthy Case*, *supra*, and is believed to be in consonance with reason, justice, and sound legal principles; and while it has not heretofore been formulated in express terms, as now stated, yet the principles upon which the rule rests are fully recognized in the previous decisions of this court, particularly in *City of Shawneetown v. Mason*, 82 Ill., 337, [25 Am. R., 321]; *City of Pekin v. Brereton*, 67 Ill., 477, [16 Am. R., 629]; *Railroad Co. v. Francis*, 70 Ill., 238; *City of Pekin v. Winkel*, 77 Ill., 56; and *city of Elgin v. Eaton*, 83 Ill., 535, [25 Am. R., 412]. In this last case, the city of Shawneetown and Brereton Cases are approvingly referred to. In the city of Shawneetown Case it was said: 'The true question is whether the property was injured by the improvements. If not, then there is no damage, and can be no recovery. If there is, then the recovery must be measured by the extent of the loss,' etc.

"One of the elements of damage distinctly recognized in this case was the physical obstruction of the right and means of access to the plaintiff's premises. And so of the Brereton Case, Winkle Case, and Eaton Case, *supra*, and Stack Case, 85 Ill., 377, [28 Am. R., 619]. In the light of these authorities, we are clearly of the opinion that the circuit court erred in refusing appellant's instruction, and also in giving appellee's; and for these errors the judgment of that court should have been reversed by the appellate court, and for not doing so the judgment of the appellate court must be reversed, and the cause remanded, with directions to that court to reverse the judgment of the circuit court, and remand the cause for further proceedings in conformity with the views here expressed.

Judgment reversed."

In *City of Chicago v. Taylor*, 125 U. S., 164, [8 Sup. Ct., 820], the same question was under consideration. Taylor had brought a suit, and obtained judgment against the city of Chicago for injury to his property by reason of certain street improvements erected by special ordinances of the city council, and the city appealed. Justice Harlan delivered the opinion of the court, and, upon a thorough review of the authorities he sustained the contention of Taylor that, under the Constitution of 1870, he was entitled to recover for the injury resulting to his property by reason of the street improvements. The opinion concludes as follows: "It would serve no useful purpose to examine in detail all the requests for instructions, and compare them with the charge, or discuss the questions arising upon the exceptions to the admission of evidence. After a careful consideration of all the propositions advanced for the city, we are unable to discover any substantial error committed to its prejudice. It may be as suggested by

its counsel that the present Constitution of Illinois in regard to compensation to owners of private property "damaged" for the public use has proved a serious obstacle to municipal improvements; that the sound policy of the old rule, that private property is held subject to any consequential damages that may arise from the erection on a public highway of a lawful structure, is being constantly vindicated; and that the constitutional provision in question is "a handicap" upon municipal improvement upon public highways. And it may also be, as is suggested, doubtful whether a constitutional convention could now be convened that would again incorporate in the organic law the existing provision in regard to indirect or consequential damage to private property so far as the same is caused by public improvements. We dismiss these several suggestions with the single observation that they can be addressed more properly to the people of the State in support of a proposition to change their Constitution. We perceive no error in the record, and the judgment is affirmed."

The Supreme Court of Missouri has passed upon a constitutional provision similar to section 242. Sheehy sued the Kansas City Cable Railroad Company for injury to his property on account of a change of grade of the street. It was admitted that the city had a right to authorize defendant to change the grade, but Sheehy recovered judgment for \$5,000, and the defendant cable railroad company appealed.

The case is reported in 94 Mo., 574, [4 Am. St. R., 396, and 7 S. W., 579]. I quote as follows from the opinion: "The court, as shown by the instructions given as well as by those refused, tried the case on the theory that while the city had the right by ordinance to change the grade of



said street in front of plaintiff's property, and to authorize defendant to make such change, still the defendant was liable for any damage resulting to plaintiff by reason of such change. It is insisted by counsel that this theory was erroneous and that the city being fully empowered by its charter to grade, alter, and change the grade of its streets, and having changed the grade of Ninth street at this locality by ordinance, and authorized and permitted defendant to grade the same for the purpose of constructing its road thereon, it is not liable for damages resulting therefrom. This point is not well taken.

"Anterior to the adoption of the Constitution of 1875, and as far back as the case of *City of St. Louis v. Gurno*, 12 Mo., 414, it was the established rule in this State that where a municipality was invested with the control of its streets, and the power to fix, alter, and change the grade of the same, that any damage resulting to an abutting property owner from the change of grade was *damnum absque injuria*, unless the injury should be shown to have resulted from the negligent or improper manner in which the work was done. Section 21, art. 2, of the Constitution of 1875, which provides that 'private property shall not be taken or damaged for public use without just compensation,' has changed this rule. *Werth v. City of Springfield*, 78 Mo., 107.

"In this case it is held that 'when property is damaged by establishing the grade of a street, or by raising or lowering the grade of a street previously established, it is damaged for public use within the meaning of the Constitution.' It is clear that the city of Kansas, under its charter, had the power to change the grade of Ninth street, and it is equally clear, under the provision of the Constitution above quoted, that if, in the exercise of that power, the

property of an abutting owner was damaged, such owner would be entitled to recover such damages from the city. And, if such liability would attach to the city, it necessarily and logically follows that a railroad company which had the right conferred on it to alter the grade of the street for the purpose of constructing its road would also be liable to an abutting property owner for damages to his property by reason of such alteration.

"In such cases the privilege granted the railroad 'would be yoked with a liability.' That the owner of property abutting on a street has such an easement therein as would support an action for damages peculiar to him is sustained by the following cases: Lackland v. Railroad Co., 31 Mo., 181; Werth v. City of Springfield, *supra*; Householder v. City of Kansas, 83 Mo., 488; McElroy v. Kansas City, 21 Fed., 257; Story v. Railroad Co., 90 N. Y., 122, [43 Am. R., 146]; Lahr v. Railway Co., 104 N. Y., 268, [10 N. E., 528]; Railroad Co. v. Eddins, 60 Tex., 663; Cross v. Railroad Co., 77 Mo., 318. The theory upon which the court tried the case, as embraced in the instructions, was a correct one. The judgment is affirmed with the concurrence of the other judges, except Ray. J., absent."

I respectfully submit that the foregoing authorities show conclusively that the majority opinion is not sustained by the authorities relied on therein, and is contrary to the weight of all the authorities bearing upon the question at issue. I further submit that the doctrine of the majority opinion is contrary to equity and natural justice.

The majority opinion in this case, as I understand it, holds that a street railway may be located and run by the very door of the house of the abutting lot owner if his house happens to be upon the line of the street, and, if the track is leveled up as described in the opinion, that the property

owner can have no redress, although we know that such a use of a street would necessarily greatly lessen the value of his property, and cause the lives of himself and children to be in imminent peril whenever they went out of the house for any purpose whatever, for they would then be upon the railway track, liable to be struck by the electric car.

If the above is not the true construction of the majority opinion yet it is unquestionably true that the opinion sustains the right of a street railway to be run right along the curbing of a sidewalk, which would practically destroy all the business houses which might be on that side of the street. If a street railway was erected along the curbing of the sidewalk on the west side of Fourth street in Louisville, who would dispute the statement that the property on that side would at once be injured fifty per cent. or more of its value if it was believed that the street-car line was permanently so established?

I have discussed this question so far upon the ground upon which the majority opinion seems to be based, namely, that the doctrine of street railways and the uses for which streets were established and dedicated applies. In my opinion, the power to establish street railways in towns and cities has no application to the case at bar. The answer of defendant (now appellant) shows that the line of railway and property in contest is not within the boundary of any town or incorporated city. That plea is made in the answer, and by it the appellant was by the court below held to be exempted from the provisions of section 164 of the Constitution; but, if the appellant is held to be entitled to all the privileges and protection of the law applicable to cities and towns, then it should be held to be subject to the provisions of section 164 of the Constitution,

and, if so held, the entire power exercised by it was and is unconstitutional.

My judgment is that no turnpike company or commissioners or the county court have any legal power or right to authorize the construction of a street railway upon any turnpike or county road. It would be a new service, and one not contemplated by the law authorizing the establishment of county roads or turnpike roads, and would seriously interfere with the safe and convenient and proper use of such highways. It is evident to my mind that the turnpike company in this case had no authority to authorize the construction of the railway in question. It will be seen from the record, as I understand it, that appellant and appellee both hold under Kinner. Kinner only granted the right of way to the turnpike company for a turnpike road; hence it could be used for nothing else. The fee remained in him, and passed to his vendees, subject only to the use granted by Kinner. If I am right in this, it follows that appellant violated both the property right and right of easement of appellee, and the instructions were more favorable to appellant than it was entitled to.

There may be some reason and equity in ruling the law as strictly as it can be legally done as to improving streets in towns, and allowing railways to be established therein, because the public are to be greatly benefited; but in the case at bar it is manifest to me that the railway in question was erected for the sole benefit of the corporation, and that neither the turnpike company nor the commissioners had any lawful authority to grant to the railway the right of way over any part of the county road, and certainly none to the injury of the plaintiff's property, nor to the detriment of his easement. It appears in this case that appellant, by force, sawed off part of appellee's porch

or platform, and removed it, and by force held or tied him while they laid the track at that point. From the proof in this case, I incline to the opinion that the appellee was the rightful owner of the land in contest. Appellant's contention is that the rail of the track is seven feet from appellee's house. Conceding that to be true, I still think that a court must judicially know that his ingress and egress to and from the road is materially and unreasonably obstructed thereby. Corporations should be protected in the full enjoyment of their legal rights, but the individual property holder should also have the full protection of the law. Section 242 of the Constitution was evidently made to give greater protection to the citizen than he had theretofore enjoyed, but, if the majority opinion in this case is to be the law of the land, the section *supra* amounts to nothing.

The importance of the questions involved is my only apology for this dissenting opinion. I think the judgment appealed from should be affirmed.

CHIEF JUSTICE HAZELRIGG DELIVERED THE FOLLOWING RESPONSE  
TO A PETITION FOR A REHEARING:

This case was argued by counsel and considered by the court on the original hearing as one involving the location of a street railway on a street of a town. It developed from an inspection of an averment in one of the various pleadings—filed, not by the appellee, but by the appellant—that the location of Faulkner's property is in fact not within the corporate limits of a town. We can not, when presenting it for the first time, consider a matter of this importance on rehearing. In the opinion, however, we hold the evidence of injury by obstruction insufficient for submission, and to this extent we modify the original opinion. It is true that the plaintiff himself neither in his

examination in chief nor in his cross-examination makes out a case of obstruction to his property. He rests his case on the claim that his lot had been absolutely invaded, and a part taken by the company; and even when recalled, later in the progress of the trial, his testimony on the point involved is incompetent, and too general to support a claim for damages for obstruction. There is some testimony, however, by other witnesses, conducing to show that the ingress and egress had been obstructed by the track of the railway; and we know from common observation that the rails of such a road do in a measure obstruct the ingress and egress, when room is not left for passage between them and the abutting property. The question should be left to the jury to determine to what extent the property has been damaged by reason of this obstruction.

We think the damages on this branch of the case are shown by the proof to be quite small, and we adhere to the original opinion that on the whole case the damages found are excessive. On return of the case, either party may amend their pleadings, raising such issues as may be involved. Petition overruled.

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CASE 40—HOMICIDE—APRIL 12.

Gibson v. Commonwealth.

APPEAL FROM CRIMINAL DIVISION OF JEFFERSON CIRCUIT COURT.

1. HOMICIDE—BY EXPOSING INFANT.—It is felony to willfully abandon a helpless infant on a cold, raw night and leave it to die of exposure, whatever may have been the purpose in so leaving it.
2. SAME—INSTRUCTION.—In such a case the court correctly instructed the jury that "If they believed from the evidence be-

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Gibson v. Commonwealth.

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yond a reasonable doubt that the defendant, without malice, but unlawfully, wilfully and feloniously cast her child upon an open lot without sufficient shelter or clothing to protect it from the inclemency of the weather, but that said act was done with the hope that it would be rescued or taken care of by some other person before it should freeze to death, but by reason of said exposure it did freeze, then, in that event, the defendant was guilty of voluntary manslaughter."

**JAMES R. W. SMITH FOR THE APPELLANT.**

1. The court should have sustained the motion for peremptory instruction for a failure of proof.
2. The facts set out in instruction No. 2 do not constitute voluntary manslaughter, but only involuntary manslaughter or unintentional homicide.
3. The court should have instructed the jury upon the subject of involuntary manslaughter.
4. The court should have instructed the jury upon the subject of murder.
5. The court should have defined murder.

Citations: Crim. Code, sec. 240; Com. v. Blackwell, 93 Ky., 309; Gist v. Com., 7 Ky. Law Rep., 45; Bowlin v. Com., 94 Ky., 391; Madison v. Com., 13 Ky. Law Rep., 313; Trimble v. Com., 78 Ky., 176; Connor v. Com., 13 Ky. Law Rep., 403; Ball v. Com., 81 Ky., 662.

**W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR APPELLEE.**

1. The Commonwealth is not bound by the statement of the defendant detailed to policeman Brock and by him testified to. The statement was a denial of guilt by the defendant.
2. The proof was sufficient to warrant the inference that the defendant's infant was abandoned while it was alive.
3. The instruction upon the subject of manslaughter was proper. Wharton's Crim. Law, sec. 345.

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

The appellant was indicted for the murder of her two months old baby, and was found guilty of manslaughter, and sentenced to the penitentiary for three years; and from that judgment this appeal is prosecuted.

The main errors upon which she relies for a reversal are (1) that the testimony in the case did not authorize the verdict of the jury; and (2) that the second instruction, which authorized the jury to find her guilty of manslaughter, did not sufficiently describe that offense.

The testimony discloses that defendant was an unmarried woman, and that she gave birth to a female child on the 9th day of September, 1879, and that on the night of 11th day of November, thereafter, she left the house where she had been staying since her accouchement, taking the child with her; that she took it some seven or eight squares away, and left it in the yard in front of a residence at the corner of Brook and Breckinridge streets, in the city of Louisville. The baby was placed in a small basket, and was covered with a shawl or other wrap. The night was a cold, raw one, and it was found dead early the next morning by a policeman. The coroner who held the inquest testifies that the child was greatly emaciated, and probably died either from starvation or exposure; the indications after death being about the same, whether it died from one cause or the other.

The defendant testifies that the child was dead at the time she left its body in front of the residence; that it had died early in the morning of the same day; that she had concealed this fact, and kept its body covered up in her bed during the day, until night, because she was not able to bury it, and did not know what to do with the body; that she left it where she did, that some one might find it and bury it. She says that, after leaving the child on the lot, she went to the house of her aunt, and spent the night, and the next day went to Cincinnati, where she was subsequently arrested. It seems to us that her testimony is very improbable, and she is flatly contradicted by the tes-



timony of Eliza Smith as to the time when the child died. She says that she saw the defendant with the child alive, and apparently well, late in the afternoon of November the 11th, and other witnesses testify to facts that show that it was well a few days before, and that defendant was anxious to be relieved of the burden of its support. We are of the opinion that there was ample evidence to authorize the submission of the case to the jury, and the motion for a peremptory instruction was properly overruled.

The law imposed upon defendant the duty of protecting and caring for her offspring to the best of her ability; and when she willfully abandoned it on a cold, raw night, and left it to die from exposure, she was guilty of a felony, whatever may have been her purpose in leaving it. Wharton, in his work on Homicide (section 304), says: "If a person do or omit to do an act towards another, who is helpless and dependent, which act or omission, in usual, natural sequence, leads to the death of that other, the crime amounts to murder, if the act or omission be intentional; but if the circumstances are such that the person would not be, or could not have been, aware that the result would be death, that would reduce the crime to manslaughter, provided the death was occasioned by an unlawful act, but not such an act as showed a malicious mind. Thus, where a woman left her child, a young infant, at a door or other place where it was liable to be found or taken care of, and the child died, it would be manslaughter only; but if the child was left at a remote place where it was not liable to be found, and the death of the child ensued, it would be murder." The same doctrine is announced in Bishop on Criminal Law, secs. 557, 883, and in 1 Hawkins P. C., 564.

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Chesapeake & Ohio Railway Co. v. Judd's Admx.

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The instructions in the case were as favorable to the defendant as the testimony authorized—especially the “second,” on the question of manslaughter. By it the jury were told that “if they believed from the evidence, beyond a reasonable doubt, that the defendant, without malice, but unlawfully, willfully, and feloniously, cast her child upon an open lot, without sufficient shelter or clothing to protect it from the inclemency of the weather, but that said act was done with the hope that it would be rescued or taken care of by some other person before it should freeze to death, but by reason of said exposure it did freeze, then, in that event, the defendant was guilty of voluntary manslaughter.”

We think this instruction fairly stated the law on the question of voluntary manslaughter; and, upon the whole case, that there has been no error prejudicial to the substantial rights of the defendant.

Wherefore the judgment is affirmed.

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CASE 41—ACTION FOR INJURY CAUSING DEATH—APRIL 13.

Chesapeake & Ohio Railway Co. v. Judd's  
Administratrix.

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APPEAL FROM BOYD CIRCUIT COURT.

1. NEGLIGENCE—PEREMPTORY INSTRUCTION.—In this action for injury resulting in death, as the evidence showed that the engine furnished by defendant to plaintiff's intestate was totally unfit for use, while the evidence of his knowledge of that fact was conflicting, the court properly refused a peremptory instruction.
2. INSTRUCTIONS.—The court properly refused instructions offered by the defendant calling special attention to particular points in the evidence.

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Chesapeake & Ohio Railway Co. v. Judd's Admx.

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3. DAMAGES.—As the jury has separated its findings so as to fix \$13,500 as the compensatory and \$5,000 as the punitive damages, this court will disregard an erroneous instruction authorizing punitive damages, will reverse the judgment giving punitive damages and affirm that for compensatory damages.

WADSWORTH & COCHRAN FOR APPELLANT.

I. Appellant was entitled to peremptory instruction at the close of all the evidence.

(1) Because deceased knew defective condition of engine in question and assumed the risk thereof.

(a) Obviousness of defective condition of machinery and opportunity to observe equivalent to actual knowledge. *Bogenschutz v. Smith*, 84 Ky., 330; *L. & N. R. R. Co. v. Robinson*, 13 Ky. Law Rep., 153; *Lawrence v. Hagemeyer*, 93 Ky., 590; *Bradshaw's Admr. v. L. & N. R. R. Co.*, 14 Ky. Law Rep., 689.

(b) Defective condition of engine in question obvious and deceased had ample opportunity to observe it.

(c) Deceased had personally witnessed the engine do as it did on occasion of accident and had been informed by engineer as to its condition before the accident.

(d) He was conductor of train and engine and engineer under his control and in his charge. It was his duty to know its condition. *Mad River R. R. Co. v. Barber*, 67 Am. Dec., 312.

(e) The fact that it had been in the repair shop the previous Saturday night did not authorize deceased to act upon the idea that it had been placed in sound and safe condition. It went into repair shop every Saturday night and the repairs there made had no permanent or reliable effect on its condition and this to knowledge of deceased if he knew that it was in the habit of going there.

(f) A promise to repair machinery not kept, after lapse of reasonable time to repair, or an assurance that it has been repaired when obviously it has not been, can not be relied on. *M. H. & O. R. R. Co. v. Spears*, 44 Mich., 169; *Gulf, &c., Ry. Co. v. Brentford*, 79 Tex., 619; *Stephenson v. Duncan*, 73 Wis., 404; *Eureka Co. v. Bass*, 81 Ala., 200; *Lawrence v. Hagemeyer*, 93 Ky., 591.

(g) Besides no evidence that deceased knew that engine in question had been in repair shop previous Saturday night.

(h) If deceased knew defective condition of engine and con-

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Chesapeake & Ohio Railway Co. v. Judd's Admr.

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sented to labor for appellant in connection with it in that condition, neither he nor his personal representative has a right to urge that appellant's business could have been conducted in a less hazardous way. *Bailey's Personal Injuries Relating to Master and Servant*, vol. 1, secs. 504, 505, 508.

(1) Burden on appellee to allege and prove want of knowledge on part of deceased of defective condition of engine. *Newman's Pl. & Pr.*, 723; *Erment v. Dietz*, 44 S. W. R., 138; *Logan Co. Nat. Bk. v. Barkley*, 46 S. W. R., 675; *Bogenschutz v. Smith*, 84 Ky., 330; *L. & C. Co. M. Co. v. Stephens' Admr.*, 47 S. W. R., 321; *Bailey's Pers. Inj. Rel. to Mast. & Serv.*, vol. 1, 314; *Needham v. L. & N. R. R. Co.*, 85 Ky., 423; *O'Bannon's Admr. v. L. & N. R. R. Co.*, 9 Ky. Law Rep., 706; *Derby's Admr. v. K. C. R. R. Co.*, 9 Ky. Law Rep., 153; *Nance's Admr. v. N. N. & M. V. Ry. Co.*, 13 Ky. Law Rep., 554; *Bradshaw's Admr. v. L. & N. R. R. Co.*, 14 Ky. Law Rep., 688; *Passamaneck's Admr. v. L. Ry. Co.*, 98 Ky., 195; *L. & N. R. R. Co. v. Miller*, 15 Ky. Law Rep., 699; *Artz v. R. R. Co.*, 34 Ia., 153; *Payne v. Chicago, &c., R. R. Co.*, 136 Mo., 562.

(2) Because, according to the undisputed testimony, deceased was guilty of contributory negligence, but for which the injuries complained of would not have been sustained.

(a) Deceased attempted to make the coupling when the brakeman, whose duty it was to make it, was proceeding to make it, and when it was not his duty to make it, but to see that the brakeman made it.

(b) He did not notify the fireman, acting as engineer, that he was going to make it.

(c) He attempted to make it when, at the speed the engine was approaching the caboose, it was dangerous to attempt to make it at all. *Lockwood v. C. & N. R. R. Co.*, 55 Wis., 50; *Nubals v. Chicago, &c., Co.*, 69 Ia., 156; *Norfolk, &c., R. R. Co. v. Colrett*, 83 Va., 512; *Kennedy v. Lake Superior, &c., Ry. Co.*, 87 Wis., 28.

(d) He chose a way of making the coupling which was the most dangerous way in which it could have been made.

(e) To choose a way of doing a thing which is more dangerous than another mode which might have been chosen when servant has choice of modes, is contributory negligence on part of servant. *Shearman & Redfield on Negligence*, sec. 207; *St. Louis, &c., Co. v. Burke*, 12 Ill., 369; *Nolan v. Shickle*, 69

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Chesapeake & Ohio Railway Co. v. Judd's Admx.

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Mo., 339; Russell v. Tillotson, 140 Mass., 201; Mobile, &c., Co. v. Holborn, 84 Ala., 137; English v. Chicago, &c., Ry. Co., 24 Fed. 906; Gordon v. Harley, 56 Fed. Rep., 973; Richmond & D. R., Co. v. Bivens, 103 Ala., 142.

II. A new trial should have been granted because the verdict of the jury was against the weight of the evidence and contrary to law.

III. The following instructions should not have been given to the jury:

(1) Instruction No. 3 because no evidence that decedent knew that appellant had undertaken to repair engine and assumed that if he knew the decedent had a right to presume that it had been put in safe condition. Under the circumstances he had no right so to presume.

(2) Instruction No. 7 contains wrong definition of contributory negligence, M. & L. R. R. Co. v. Herrick, 13 Bush, 122; Cincinnati, &c., Ry. Co. v. Palmer, 98 Ky, 382.

IV. The following instructions should have been refused:

(1) Instruction "B" because evidence tending to show engine in question suitable for the work in which it was engaged.

(2) Instruction "C" and "L" because defect in shackle-bar not patent; and if patent, decedent's opportunity of discovering it as great as appellant's.

(3) Instruction "D" because unless decedent knew that engine had been in repair shop the previous Saturday night and had reason to believe that it could have been, and was put in a reliable condition, the fact that it had been there had no bearing on the case.

(4) Instructions "F," "G," "H," "I," "J," and "K" because they were the law of the case and appellant was entitled to have the whole law given. Holmes' Common Law, 111.

(5) Damages allowed excessive. R. R. Co. v. Kelly's Admr., 38 S. W. R., 852; s. c. 40 S. W., 452; Ry. Co. v. Lang's Admr., 40 S. W. R., 451; s. c. 41 S. W. R., 271; R. R. Co. v. Eakin's Admr., 45 S. W. R., 529.

SAME COUNSEL IN PETITION FOR REHEARING.

W. S. PRYOR AND J. A. SCOTT FOR APPELLEE.

Counsel discussed *seriatim* the points urged by appellant's counsel for reversal and cited: M. & L. R. R. Co. v. Herrick,

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Chesapeake & Ohio Railway Co. v. Judd's Admx.

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13 Bush, 125; Barland v. Barrett, 76 Va., 136; 36 Miss., 640; 67 N. Y., 52-56; L. & N. R. R. Co. v. Kelly's Admx., 100 Ky., 448; Judd's Admx. v. C. & O. Ry. Co., 18 Ky. Law Rep., 747.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This action was instituted by the appellee against the appellant to recover damages for the death of the intestate, who was her husband, who, while in the employ of the appellant as conductor of a freight or construction train, was killed, as is alleged by gross carelessness and willful negligence of defendant, its agents, etc., in the year 1892, and for which she sought to recover the sum of \$40,000.

The answer may be treated as a denial of all the averments of the petition tending to show a right to recover, and also contains a plea of contributory negligence, all of which was controverted by the reply.

The first trial resulted in a verdict and judgment in favor of plaintiff for \$10,000, which the circuit court set aside, and awarded appellant a new trial. After considerable delay, another trial was had, and at the conclusion of plaintiff's testimony the circuit court gave peremptory instructions to find for the defendant, and from that judgment plaintiff prosecuted an appeal to this court, and also prosecuted an appeal from the judgment awarding the new trial aforesaid. This court reversed the latter judgment, rendered under the peremptory instruction of the court, but declined to order the circuit court to render a judgment upon the verdict for \$10,000 damages.

After the return of the case to the circuit court, another trial was had, and the jury rendered a verdict in favor of the plaintiff (now appellee) for \$13,500 for the loss of power to earn money, and \$5,000 punitive damages; and, appellant's motion for a new trial having been overruled, it prosecutes this appeal.

Many technical questions were raised during the trial,

which we deem unnecessary to discuss or decide. But few or any of them are insisted on in this court. But it is earnestly contended for appellant that the court should have given a peremptory instruction to find for the defendant. The evidence in this case is as strong as, if not stronger than, at the time the court gave a peremptory instruction to find for the defendant, which was reversed by this court; and it may well be conceded that the decision of this court is conclusive as to the right of plaintiff to have the case submitted to a jury; and, if plaintiff's testimony authorized a submission to the jury, it necessarily follows that no amount of testimony introduced by the defendant could authorize the court to take the case from the jury on a peremptory instruction. Such action would, in effect, nullify the right of trial by a jury. But we are not disposed to place our decision entirely, or even chiefly, upon the former opinion of this court. The evidence in this case conduces to show that the engine furnished by defendant to plaintiff's intestate to use and operate was totally unfit for the use to which it was devoted, and this proposition is not seriously controverted by the appellant, but it insists that the deceased knew, or could by ordinary diligence have known of the defects of the engine, and, that being the case, it is the contention of appellant that no recovery can be had. It is also contended that the deceased was negligent in his attempt to couple the cars, at which time he lost his life; and it is ably and extensively argued that he was negligent in many respects.

It is also contended for appellant that the court erred in giving and refusing instructions. We are, however, of opinion that the court did not err in refusing to give the instructions offered by appellant. Many of them tend to specially call attention to particular points in the evidence.

Such instructions have been uniformly condemned by this court. We are further of opinion that the instructions given by the court, except instruction No. 7, were quite as favorable to appellant as it was entitled to, and correctly stated the law applicable to the case on trial.

It may be conceded that there was some testimony introduced conducing to show that the deceased knew, or might have known, of the defective condition of the engine; but the preponderance of the evidence tends to show that some of the material defects which caused the injury, or from which it resulted, were not known to deceased, and could not, with ordinary care on his part, have been discovered; and it was for the jury to weigh, and determine from all the facts and circumstances the truth of the matters in issue.

It is also insisted for appellant that the verdict for \$13,500 is excessive. But there is nothing in this case to indicate that the jury was influenced by passion or prejudice, and the question of damages has always been considered peculiarly within the province of the jury; and inasmuch as the jury heard all of the witnesses, and were presumably familiar with the facts and circumstances surrounding the case, we are of opinion that the verdict was not excessive in this case.

Instruction No. 7 reads as follows: "Gross negligence, as used in these instructions, is the absence of ordinary care."

It seems to us that this instruction would probably lead the jury to believe that they might find punitive damages in a case of mere ordinary negligence. We are not inclined to the opinion that, under the testimony in this case, ordinary negligence could or should be considered gross negligence; and inasmuch as the jury has separated



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Rogers v. Farmers' Mutual Aid Association.

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its findings as to compensatory and punitive damages, and inasmuch as this case has been in court for many years, we are of opinion that the ends of justice will be subserved by reversing so much of the verdict and judgment as allows any punitive damages, but allowing the verdict and judgment to the extent of \$13,500 to stand.

The judgment appealed from is therefore reversed and the cause remanded, with directions to the court below to set aside the \$5,000 verdict and judgment for punitive damages, and to render judgment only for \$13,500, and for proceedings consistent herewith.

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CASE 42—ACTION ON INSURANCE POLICY—APRIL 14.

## Rogers v. Farmers Mutual Aid Association.

## APPEAL FROM MASON CIRCUIT COURT.

**INSURANCE—WAIVER OF FORFEITURE.**—A mutual insurance company, by making assessments upon a member of the company after notice to its solicitor that additional insurance had been taken out on the insured property, waived the forfeiture prescribed by its policy as a penalty for additional insurance.

**E. L. WORTHINGTON FOR APPELLANT.**

1. A violation of a condition in the policy that notice of additional insurance must be made to the secretary in writing did not render the policy void or voidable.
2. Appellee waived its right to avoid the policy, if it had any, by continuing to treat it as in force after it received notice of the additional insurance.

Citations: 11 Am. & Eng. Ency. of Law, 288; Fireman's Ins. Co. v. Cecil, 12 Ky. Law Rep., 259; Rhode Island Underwriters' Association v. Monarch, 98 Ky., 305; Von Bories v. United Life Ins. Co., 8 Bush, 136; Hayward v. National Ins. Co., 14 Am. Rep., 400; Morrison v. Ins. Co., 5 Am. St. Rep., 68; 4 Thomp-

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Rogers v. Farmers' Mutual Aid Association.

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son on Corporations, secs. 5190, 5238; Hamilton v. Home Ins. Co., 94 Mo., 353.

A. M. J. COCHRAN FOR APPELLEE.

Counsel discussed *seriatim* the errors urged by counsel for the appellant, and in support of his argument made the following citations: Fireman's Ins. Co. v. Cecil, 12 Ky. Law Rep., 259; May on Insurance, vol. 1, sec. 156; Rhode Island U. Assn. v. Monarch, 98 Ky., 305; Mechem on Agency, secs. 718, 725, 729; Haywood v. National Ins. Co., 14 Am. Rep., 400; Morrison v. Ins. Co., 5 Am. St. Rep., 63; Brewer v. Chelsea, &c., 14 Gray, 203; Hawkins v. Rockford Ins. Co., 70 U. S., 1; Evans v. Trimountain, &c., Co., 9 Allen, 329.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

The appellee, the Farmers' Mutual Aid Association of Mason county, issued to appellant a policy of fire insurance on his dwelling house, for \$250, about the 18th day of October, 1893; the value of the dwelling being fixed by the soliciting agent of the insurance company at \$375; the policy being for two-thirds of the amount of such valuation. The first restriction in the policy provides that no house or other property will be insured for more than two-thirds of its cash value; the second restriction provides that "members of this company" may seek protection in other companies, provided their insurance does not exceed, in the aggregate, two-thirds of the value of the building thus insured and by-law No. 17, which was also attached to, and made a part of, the policy, provides that any party desiring insurance on contents or property must make it known to the secretary, in writing, before insuring in other companies.

On October 9, 1895, the house covered by the policy was destroyed by fire; and, upon the refusal of appellee to pay the insurance covered by the policy, this suit was instituted. Appellee sought to avoid liability on the ground

that, while the policy was in full force, the appellant, in violation of the by-laws and restrictions contained therein, took out additional insurance on his property in The Phoenix Insurance Company to the amount of \$200, which additional insurance was in force at the time of the loss; it being contended that this violation of one of the restrictions of the policy forfeited all rights to indemnity growing out thereof.

Appellant, in his reply, pleads first that the violation of the restrictions as to the amount of insurance did not render the policy void, because the policy itself did not so provide. And he also pleads that at the time the policy was in full force, and when there was no other insurance on the property, he applied to The Mason County Building and Saving Association to borrow from it \$200, proposing to execute a mortgage to secure this loan on his property, but that the association refused to make any loan thereon unless plaintiff would take out a policy of insurance in some regular insurance company, which was to be left with them as an additional collateral to protect them on such loan, and that thereupon, and to enable him to borrow the money on the property, he took out a policy of insurance in The Phoenix Insurance Company for \$200, and that within one week thereafter he notified William Rowe, the solicitor of the company who delivered the policy sued on to him, and who was the agent of the defendant at the time the additional policy was taken out, that he had taken out the additional policy, and stated to him the reasons which induced him to do so, and requested Rowe to let him know at once whether defendant would claim that this additional insurance avoided the policy, and that Rowe assured him this policy in defendant company would remain binding, and that on several different occasions

thereafter the defendant company assessed him on account of other houses insured in said company that had been burned down, and collected from him his proportion of the losses resulting therefrom; that the only officers of the defendant company were a President, Secretary, and four Solicitors; that, at the time of the issuing of the policy, William Rowe was, and had continued to be, one of these solicitors, and that he was authorized to solicit insurance, make contracts therefor, and sign and deliver policies; that Rowe so acted during all the time between the issue of the policy to him for the district in which his house was located; and that the defendant had notice of the additional policy of insurance, and of the circumstances under which it was taken out.

A demurrer was sustained to both paragraphs of the reply, and, appellant declining to plead further, his petition was dismissed and from that judgment this appeal is taken.

The questions to be determined are: First, whether the breach of the restriction as to the amount of insurance which plaintiff was permitted to carry upon his property operated as a forfeiture of the policy, in the absence of an express statement to that effect in the policy itself; and, next, whether the defendant company, in continuing to assess and collect the premiums on appellant to pay other losses accruing subsequently, after notice to Rowe, has not waived its right to complain thereof.

The defendant was a mutual insurance company, of very limited operation. By its charter, it is confined to taking insurance in Mason county, and to property within one mile of the county lines of Mason county. The terms under which it proposed to do business, as recited in the conditions annexed to the policy, are unique, and emphasize its very limited operations.

The conditions annexed to the policy recite: First, that the company will insure farm property, houses, and barns, or isolated property in towns and villages; second, that the company has no limit as to the duration of membership; third, that it has no cash basis, and hence no cashier; fourth, it has a basis that consists of self preservation; fifth, it promises no dividends; sixth, makes no assessments, except to meet losses; seventh, when a loss occurs, the assessment will be made *pro rata*.

The active officers of the company were its solicitors. They sought the insurance, valued the property insured by the company, issued the policies, and were the agents of the company who came in contact with its policy holders. The limited area in which they operated, and the limited business of the company, necessarily familiarized them very thoroughly with its risks, policy holders, and business. The policy does not, in express terms, provide for a forfeiture for taking out additional insurance; "and they are not favored in the law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads the party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will, and ought to, estop the company from insisting on a forfeiture, though it might be claimed under the express letter of the contract." *The N. Y. Life Insurance Co. v. Eggleston*, 96 U. S., 572. And we think this is the general doctrine of the courts of the country.

The appellee was not prejudiced by the taking out of the

additional insurance. In fact, its liability was diminished thereby, as it is entitled to have the amount of insurance held by it on the policy diminished by such sum as appellant has realized, or may be able to realize, from the policy taken out in The Phoenix Insurance Company. In other words, it is only liable for its *pro rata* with The Phoenix Insurance Company, upon a liability not exceeding \$250, or the amount of its policy; and we are of the opinion that appellee is bound by the notice given to its special soliciting agent for the district in which appellant's property was situated.

It was said in this court, in the case of The Phoenix Insurance Co. v. Spiers & Thomas, 87 Ky., 297, [8 S. W., 453], that: "The tendency of recent decisions, and, we think properly, is to hold the insurer bound by the acts and conduct of the local agent, whenever it can be done consistently with the rules of law. . . . As to third parties, the agent should, in the absence of notice to the contrary, be regarded as possessing all the powers his occupation fairly imports to the public.

"Under this rule, an agent who solicits the insurance, takes the application, receives the premium, and delivers the policy, may, in our opinion, by his conduct or acts, bind his company by way of waiver of a forfeiture on account of additional insurance, in the absence of the knowledge upon the part of the assured that his powers in this respect have been restricted. This being so, it follows that the knowledge of the agent under such circumstances is to be imputed to the company." And this doctrine has been followed in other cases by this court.

The case of Hayward v. The National Insurance Co., 14 Am. Rep., 400, was a case of additional insurance. The policy in suit contained a provision that if the insured

should have, or thereafter make, any other insurance on the property, without the consent of the company indorsed thereon, no recovery could be had on the policy in the event of loss. At the time the policy was issued, there was additional insurance, and subsequently to its issue the additional insurance was renewed in another company. This additional insurance was relied on as avoiding the policy. The opinion of the court, in passing upon this question, said: "It is contended by the defendant in this case that no notice to the agent of the company could operate as notice to the defendant, unless the agent received the notice at a time in which said agent was engaged in the execution or performance of the business to which the notice related, or unless it is shown that the agent communicated the notice to his principal." In response to this contention, the court said: "I think that it is not the proper construction to give to these cases. The meaning must be that the notice must be given to the agent while his agency exists, and it must refer to business which comes within the scope of his authority. When this is the case, I think the notice to the agent is notice to the principal. In fact, there is no other way to notify a corporation than to notify its agent. A corporation only acts through and by agents, and the proper and only way to give notice to a corporation is to notify an agent; and generally it is sufficient to notify an agent, whose proper business is to attend to the matter in reference to which the notice is given."

And we are of the opinion, under the circumstances of this case, that notice to Rowe, and knowledge on his part of the additional insurance, was a notice to the company itself. But the averment in this case goes further, in the amended reply, and avers that the defendant itself had notice of the additional policy of insurance taken out by

Town of Providence, &c., v. Shackelford & Foxwell, &c.

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plaintiff on his house, and of the circumstances under which it was taken out. This was certainly sufficient to support a cause of action.

For the reasons indicated, the judgment appealed from must be reversed, and the case is remanded for proceedings consistent with this opinion.

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CASE 43—ACTION FOR MONEY HAD WITHOUT CONSIDERATION  
—APRIL 14.

Town of Providence, Etc. v. Shackelford & Foxwell, Etc.

Same v. Price & Frederick.

Same v. Forsythe & Henry.

Sebree City v. Klyman.

Same v. Hampton & Rayborn.

APPEALS FROM WEBSTER CIRCUIT COURT.

**MUNICIPAL CORPORATIONS—RECOVERY OF MONEY ILLEGALLY COLLECTED FOR LIQUOR LICENSE.**—The appellant municipalities having been transferred by the circuit court from the sixth class to the fifth, collected of each of the appellees a liquor license of \$1,000. The act under which the transfer was made having been adjudged invalid the appellees sued to recover the difference between the maximum license authorized by cities of the sixth class (\$500) and the amount paid. It is held by the court that plaintiffs are not entitled to recover. The payment was made to a *de facto* city of the fifth class and appellees are estopped to deny the validity of the organization.

M. C. AND G. D. GIVENS FOR THE APPELLANTS.

1. Taxes paid voluntarily can not be recovered back by suit, and voluntary and involuntary payments distinguished. City of Louisville v. Anderson, 79 Ky., 334; L. & N. R. R. Co. v. Hopkins County, 87 Ky., 605; L. & N. R. R. Co. v. Com., 89 Ky., 531;



Town of Providence, &c., v. Shackelford & Foxwell, &c.

Bruner & Bloom v. Clay City, 18 Ky. Law Rep., 1008; Bruner v. Town of Stanton, 19 Ky. Law Rep., 1514.

2. Section 162 of the Constitution applied to implied as well as express contracts. Herzog Mfg. Co. v. Canyon Co., 85 Fed. Rep., 396; Beach on Contracts, sec. 1208 and notes; Story on Con., sec. 1377; Cooley's Student Ed. to Const. Lim., p. 324; Craycraft v. Selvage, 10 Bush, 708.

JOHN W. LOCKETT ON THE SAME SIDE. (F. M. BAKER AND M. C. & G. D. GIVENS OF COUNSEL.)

1. We admit that the circuit court could not transfer these towns from the sixth to the fifth class, 95 Ky., 233.
2. But the court, under section 3661 of the statutes, rendered a judgment of transfer. The local community accepted it in good faith as valid and organized a fifth class city government and the ordinances of said government are valid and only the State can deprive the towns of the franchises of a fifth class city. Dillon on Mun. Corps. (4th ed.), sec. 43a, p. 76 and notes; Cooley's Const. Lim. (6th ed.), pp. 309, 310, and notes; Geo. S. & F. R. R. Co. v. Mer. Trust Co., 94 Ga., 306; s. c. 47 Am. St. Rep., 143; Thompson on Corps., secs. 502-3-4 and cases cited in the opinion, 7 Bush, 639; 85 Ky., 413.
3. Both these towns had the requisite population to be fifth-class cities and though transferred in an unauthorized manner, yet, acting under color of law, their municipal acts as fifth-class cities are binding. Same authorities above cited.
4. The officers of a corporation claiming in good faith to be fifth-class cities are *de jure* officers; certainly *de facto* officers of fifth-class cities, whose acts within the powers of officers of a fifth-class city are valid and can not collaterally be drawn in question. Dillon on Mun. Corps., sec. 276; Norton v. Shelby, 118 U. S., 425; 1 J. J. Mar., 206; 1 Blackstone, 371.
5. If the ordinances be valid there was no mistake of law in paying for the license. Appellees recognized them as ordinances of a fifth-class city and are estopped to question their validity. Cooley on Const. Lim., pp. 509-10; 16 Ind., 276; 8 Ind., 38.
6. The Constitution forbids the city to pay a debt created without express authority of law. Sec. 162.
7. Shackelford and Foxwell sued before they had paid more than they admit they should pay, and having their day in court as to the balance can not recover. L. & N. R. R. Co. v. Hopkins County, 87 Ky., 605; Same v. Com., 89 Ky., 531.

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Town of Providence, &c., v. Shackelford & Foxwell, &c.

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8. Price & Frederick and Forsyth & Henry knew that the validity of the ordinances was questioned before they took out license and voluntarily paying the price demanded and receiving the benefits thereby, should not be heard to complain. Klyman did not want license unless the price was \$1,000. Note on pages 181-23, 33 Am. St. Rep.; Kuhn v. Port Townsend, 50 Am. St. Rep., 911.

C. J. WADDILL, J. F. GORDON AND BURBANK & RAYBOURN  
FOR APPELLEES.

1. The transfer of the towns of Providence and Sebree City from sixth- to fifth-class by the circuit court was without legal effect, and these towns were sixth-class towns *de jure*. Jernigan v. City of Madisonville, 19 Ky. Law Rep., 1412.
2. Sixth-class towns only authorized to charge from \$150 to \$500 for liquor license. See charter sixth-class towns.
3. These towns charged appellees \$1,000, which appellees paid under mistake of law and fact, and are entitled to recover the excess so paid. Bruner & Bloom v. Clay City, 18 Ky. Law Rep., 1008; Bruner v. Town of Stanton, 19 Ky. Law Rep., 1514; Hite v. Town of Stanton, 2 Ky. Law Rep., 386; City of Owensboro v. Elder, 3 Ky. Law Rep., 255, and cases cited.
4. These towns being by act of Legislature made sixth-class towns *de jure*, can not be cities of another class *de facto*.
5. There was no such city or town *de jure* as Sebree City of the fifth class, or Providence of the fifth class, and there can be no *de facto* trustees of a city which does not exist. There is no such thing as *de facto* office known to the law. See Hildrich v. McIntyre, 1 J. J. M., 206.
6. Appellant towns can not plead their *de facto* organization in their own protection, acts of *de facto* officers and organizations not valid as to themselves, as it is equivalent to taking advantage of their own wrong. Creighton v. Com., 83 Ky., 147; 5 Am. & Eng. Ency. of Law, 107-8 and notes.
7. Section 162 of the Constitution does not apply. Appellant's obligation to refund in these cases does not spring from contractual relationship express or implied, or to be inferred from conduct, but it originated by the general obligation to do justice which rests upon all persons natural or artificial and upon public as well as private corporations. Beach on Contracts, sec. 1140; Newberger v. Town of Barnwell, 20 S. E. R., 14; 15 Am. & Eng. Ency. of Law, 1082-3 and notes; Lawson on Contracts, sec. 3, *et seq.*

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Town of Providence, &c., v. Shackelford & Foxwell, &c.

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8. Appellee Klyman not estopped by requesting that license fee be fixed at \$1,000, as there is no proof that he knew that the trustees had no such authority.
9. Hampton and Rayborn not estopped by contract subsequently executed by appellee Hampton as this contract was procured from him by duress and under circumstances of oppression, these conditions are a bar to estoppel. *Bruner & Bloom v. Clay City, supra.*
10. Shackelford and Foxwell not estopped, appellants' plea of notice on part of appellees is merely an affirmative denial. Notice that the legality of the ordinance was questioned, not sufficient to estop. Appellees not presumed to know more than the executive and legislative departments of the governments under which they live. *City of Louisville v. Anderson, 79 Ky., 334; Bruner v. Town of Stanton, supra.*
11. Payment of the \$500 note by appellees was an involuntary payment and was done under circumstances of hardship and oppression and does not create estoppel.
12. Forsyth & Henry and Price & Frederick not estopped under the evidence and instructions; the jury settled this question by their verdict, and being a plain matter of fact, their finding can not be disturbed.

SAME COUNSEL FOR APPELLEES IN A PETITION FOR A REHEARING.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

These five cases, involving the same facts, have by agreement been heard together. In the classification of the towns and cities of the State by the Legislature the town of Providence and Sebree City fell in the sixth class. After this they were, by judgments of the circuit court of the county, pursuant to section 3661 of the Kentucky Statutes, transferred to the fifth class. Thereupon in each of these towns a city government, consisting of a mayor, city council, etc., was organized pursuant to the statute governing cities of the fifth class. These city authorities fixed the license for selling spirituous, vinous, and malt liquors at \$1,000. Appellees took out a license, and paid the city \$1,000 therefor. Subsequently this court

in the case of *Jernigan v. City of Madisonville*, 19 Ky. Law Rep., 1412 [43 S. W., 448], held the statute above referred to empowering the circuit court to transfer a town from one class to another to be in violation of section 156 of the Constitution. Towns of the sixth class are not authorized by statute to fix the license for selling spirituous, vinous, and malt liquors at over \$500. Kentucky Statutes, sec. 3704. Appelleesthereupon filed these suits to recover \$500 of the amount each of them had paid, on the ground that it was paid through mistake, and without authority of law.

The contention of the appellees is that, as the attempted transfer of the towns from the sixth to the fifth class was void, because in violation of the Constitution, the towns remained in fact in the sixth class, and so had power only to charge \$500 for the license; and, \$1,000 having been paid on the assumption that the towns had been legally placed in the fifth class, and so had the power of fifth-class cities, the excess over \$500 should be paid back to them. They invoke the rule adopted in this State that money paid in ignorance of law may be recovered where, in equity and good conscience, it ought not to be retained.

We do not think this principle applies here. The appellees have got all they bargained for. They wanted the privilege of selling spirituous, vinous, and malt liquors at a certain place. This they paid for, and this they have enjoyed. It is immaterial to them whether the transfer of the town from the sixth to the fifth class was legal or otherwise.

There was, in fact, a city government of the fifth class under which they conducted their business and enjoyed all the rights they expected in taking out their license. The action of this *de facto* city government of the fifth class protected third parties dealing with it. Appellees could not be indicted for selling without license, and they can

not assail the regularity of the city government which they themselves, by their conduct, acquiesced in. In *Dillon on Municipal Corporations*, section 43a, the learned author says: "Where a municipal corporation is acting under color of law, and its existence is not questioned by the State, it can not be collaterally drawn in question by private parties; and the rule is not different although the Constitution may prescribe the manner of incorporation. . . . Hence, in an action by such a corporation to recover penalties imposed by its ordinances, *nul tiel* corporation is not a good plea."

In *Atchison, &c., R. R. Co. v. Wilson*, 33 Kan., 223 [6 Pac., 281], in disposing of a case something like this, the court, refusing to allow the regularity of the organization of a municipal corporation to be assailed, said: "The legality of the organization can not be questioned in a collateral proceeding, nor at the suit of a private party. The organization can not be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding prosecuted at the instance of the State by the proper public officer."

In *Clement v. Everest*, 29 Mich. 19, in disposing of a similar objection, the court said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed except by some direct process authorized by law, and then only for very grave reasons."

In *Kuhn v. Port Townsend* 29 L. R. A., 447 [41 Pac., 925], the Supreme Court of Washington said: "A private citizen can not question the right of a municipal corporation to exercise the authority, powers, and functions of an

Town of Providence, &c., v. Shackelford & Foxwell, &c.

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incorporated city. This can be done only in a direct proceeding prosecuted by the proper public officers of the State."

To same effect, see Cooley on Constitutional Limitations, (6th Ed.), 309, 310, and Thompson on Corporations, section 503. These principles have been recognized by this court, and it is well settled that one who deals with a corporation, and recognizes its existence, is not permitted to raise the question whether it has been legally organized or not. *H. & N. R. R. Co. v. Leavell*, 16 B. Mon., 363; *Hughes v. Somerset Bank*, 5 Litt., 46; *Wight v. The Shelby R. R. Co.*, 16 B. Mon., 7; [63 Am. Dec., 522]; *Gill's Adm'x v. Kentucky, &c., Mining Co.*, 7 Bush, 739.

Appellees, as citizens of the towns, not only acquiesced in their organization as fifth-class cities, but, by taking out licenses from them and acting under these licenses, they recognized the existence of the city government, and can not now raise the question whether they had been legally organized or not. The last Legislature passed an act transferring these cities to the fifth class (see Acts 1898, p. 81), and so all questions of irregularity has now been removed.

The government of a sixth-class town is totally different from that of a fifth-class city. It is conducted by different officers. One has a mayor and city council; the other has only a board of five trustees. The cities in question had no government as towns of the sixth class when these licenses were taken out, and, if the *de facto* government as a city of the fifth class was void, there was no government at all. Appellees did not receive a license from a sixth-class town. They received a license from a *de facto* fifth-class city, and the regularity

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Wilson v. Parson's Admr.

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of this fifth-class city government not having been questioned by the State can not be questioned by them.

The judgments below are therefore reversed, with directions to the court below to grant the appellants a new trial in each of these cases, and for further proceedings in conformity to this opinion.

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CASE 44—DESCENT AND DISTRIBUTION—APRIL 15.

## Wilson v. Parson's Administrator.

## APPEAL FROM CARLISLE CIRCUIT COURT.

**DESCENT AND DISTRIBUTION—INFANT'S EXEMPT PROPERTY.**—Upon the death of an infant whose estate consists of the proceeds of the sale of personal property and rent of the homestead which had been set apart to the joint support of the deceased infant and her brother, also an infant, the said proceeds and rent go to the surviving brother, and not to the administrator of the deceased infant.

(No brief on file for the appellant.)

**J. D. WHITE & SON AND W. RAY MOSS FOR APPELLEES.**

The personal representative of the deceased infant has the right to collect and take charge of the dead infant's personal property. *Roberts' Admr. v. Eales*, 10 Ky. Law Rep., 360.

**CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Upon the death of an infant whose estate consists solely of the proceeds of the sale of personal property, and rent of the homestead which had been set apart for the joint support of the deceased infant and her brother, also an infant, the said proceeds and rent go to the surviving brother, and not to the administrator, of the deceased infant. Under our statute, the same property is set apart for the support of a single infant as is set apart for the

## Mutual Fire Insurance Co. of New York v. Hammond.

support of a number of them; and the property so set apart is for the support of the infant or infants, as the case may be, and for the support and use of the survivors of them. Whether there is one or a number of infants, the law contemplates that the exempt property is not more than is necessary for such support, and it is contemplated that the property will be consumed by the uses to which it is dedicated.

Appellant, as guardian of the surviving infant, therefore, and not the appellee, as administrator of the deceased infant, is entitled to the fund in contest herein.

Judgment reversed, to the end that it may be so adjudged.

JUDGE WHITE NOT SITTING.

## CASE 45—INSURANCE—APRIL 20.

Mutual Fire Insurance Co. of New York v.  
Hammond.

## APPEAL FROM LAWRENCE CIRCUIT COURT.

## 1. COURTS—JURISDICTION—ACTIONS AGAINST INSURANCE COMPANIES.—

Under section 71 of the Civil Code providing that actions against insurance companies arising out of transactions with an agent may be brought in the county in which such transaction took place, an action may be maintained against an insurance company having its principal office in New York upon an adjustment of a loss made by its agent in this State in the county where such adjustment took place, although the policy was issued to a citizen of West Virginia in that State upon property located there.

## 2. SAME—SERVICE OF PROCESS ON INSURANCE COMMISSIONER.—In such an action this court will indulge the presumption that the company complied with the law, and will uphold the validity of a judgment upon service of summons upon the Insurance Commissioner.

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Mutual Fire Insurance Co. of New York v. Hammond.

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3. **INSURANCE—WAIVER OF CONDITION OF ABSOLUTE OWNERSHIP.**—Where, at the time of the obtainment of a policy of insurance, the agent of the insurance company knew that the appellant held the title in trust for himself and others jointly, his representation of absolute ownership will not avoid the policy.
4. **SAME—ACTION IN NAME OF INSURED.**—In such a case the insured may maintain an action in his own name without joining as plaintiffs those jointly interested.

**STEWART & STEWART FOR THE APPELLANT. (LAOCHMAN, MORGANTHAW & GOLDSMITH, OF NEW YORK, OF COUNSEL.)**

1. On the plea to the jurisdiction of the court. *German Ins. Co. v. Ford*, 7 Ky. Law Rep., 308; Civil Code, secs. 71-2; *C. & O. Ry. Co. v. Cowherd*, 16 Ky. Law Rep., 373; *Kentucky Mutual Security Fund Co. v. Logan's Admr.*, 90 Ky., 364; Ky. Stats., sec. 681; *LiHard v. Brannin, &c.*, 91 Ky., 511.
2. Appellant was entitled to have his case tried by the regular judge.
3. On incompetent testimony: *Abbott's Trial Evidence*, p. 191; Same, p. 480; *Dickerman v. Quincy Mutual Fire Ins. Co.*, 67 Vt., 609; *Flannery v. State Mutual Fire Ins. Co.*, 175 Pa. St., 387; *Bruen v. Grahn*, 5 Ky. Law Rep., 312; *Mechem on Agency*, par. 100; *Reynolds v. Continental Ins. Co.*, 36 Mich., 131; *North v. Metz, Jr.*, 57 Mich., 612.
4. The action was prematurely brought.
5. The appellee, if he had a right to recover at all, could not recover exceeding one-third of the one thousand dollars.
6. The contract made with Battallana, if made, was void for want of consideration. *Amer. Fire Ins. Co. v. Brooks*, 83 Maryland, 22; *Mechem on Agency*, par. 931; *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich., 502; *Security Ins. Co. v. Bronger*, 6 Bush, 146; 1 Ky. Law Rep., 128; *Phoenix Ins. Co. v. Lawrence*, 4 Met., 9.

**ALEXANDER LACKEY FOR APPELLEE.**

1. Suit against insurance company may be brought where contract is made. Civil Code, sec. 71.
2. Service may be made on insurance commissioner. Ky. Stats., secs. 631, 571.
3. Agency of one representing insurance company may be shown by possession of its blanks. *May on Ins.*, 126; *Howard Ins. Co. v. Owen*, 94 Ky., 881.

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Mutual Fire Insurance Co. of New York v. Hammond.

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4. Where proof or knowledge of agency is within exclusive knowledge of company, burden is on principal to show its existence or non-existence. *Murrell v. McAllister*, 79 Ky., 311.
5. Otherwise the presumption is that if produced it would sustain the other side.
6. Where any competent evidence is produced showing agency declarations of alleged agent showing agency made in course of transaction are competent. 1 *Greenleaf on Ev.*, 113; *Story on Agency*, 134, 137; *Abbott's Trial Evidence*, sec. 130, and authorities cited; 21 *How.*, (U. S.), 164.
7. Where principal is shown to act through agents, conversations with one claiming to be agent, are competent evidence to show agency of one being or appearing to be in charge of the business. *Abbott's Trial Briefs*, sec. 102, and authorities cited.
8. Where an agent or officer is entrusted with the transaction of business for a corporation, his powers are sufficient to authorize him to perform his duty unless it is shown that they were less and that the other party knew of this limitation. *Phoenix Ins. Co. v. Spiers*, 87 Ky., 285.
9. Where proof of loss is sent by registered letter, a receipt returned purporting to be signed by the company by an agent, a letter is then received purporting to be from the company which is also sent by registered letter, in which refusal to pay is made for the want of liability for loss on ground that insured was not the sole owner, this is evidence that the first was received and that the company denied its liability. *U. S. v. Duff*, 6 Fed., 45; 33 *Minn.*, 492; *Bush v. Miller*, 13 *Barb.* (N. Y.), 481.
10. Where an agent knew title of property was in insured and others when application was made and policy was taken in name of insured alone in whose name the business was carried on, this is notice to the company and it is liable notwithstanding the policy provided it is void if title is not "sole." *Phoenix Ins. Co. v. Phillips*, 16 Ky. Law Rep., 122; *California Ins. Co. v. Gracey*, 22 *Am. Rep.*, 376; 13 *Wallace*, 222; 28 *Am. St. R.*, 693; and this is true although the agent had no authority to write a policy without its approval by the general agent. *May on Ins.*, 57; *Boatman, &c., Ins. Co. v. Young*, 11 Ky. Law Rep., 288; 34 *Am. St. Rep.*, 878.
11. All these questions are passed on by this court in the late case of *Rhode Island Underwriters v. Nance's Adm.*, 17 Ky. Law

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Mutual Fire Insurance Co. of New York v. Hammond.

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Rep., 876. See also Pratt v. N. Y. Cent. Ins. Co., 55 N. Y., 505.

12. If there was any defect in bringing suit, it was in not making Charles and Johnson Hammond parties, they being joint owners of the property, but that is dispensed with by our Code. Civil Code, sec. 21. If it was a defect, it should have been taken advantage of by answer and is now waived. Civil Code, sec. 118.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

The appellant is a New York corporation, having its chief place of business in the city of New York. The appellee is a citizen and resident of West Virginia. Appellee alleges that the defendant, appellant here, issued to him a policy of insurance for \$1,250 upon his tobacco barn and its contents, consisting of tobacco and tobacco sticks, situated on his farm in West Virginia; that the policy of insurance was procured from their agent, A. B. Brode; that during the life of the policy the barn and its contents were burned up, and that a short time thereafter he entered into an agreement in Louisa, Ky., with one Frank H. Battillana, the special adjusting agent of the company, that the company should pay him \$1,000 in full settlement of all loss and damage sustained by appellee covered by the policy, which was to be paid in sixty days after appellee should furnish appellant with proof showing the value of the barn, the tobacco, and sticks destroyed, and the quantity of tobacco removed from the barn after the issuance of the policy; that he notified Battillana at the time that he owned only one-third of the property covered by the policy, and that the balance was owned by his brothers; and that the proof was furnished in conformity with the agreement, and payment refused.

The appellant denies that the Kentucky court has jurisdiction of the case, for the reason that appellant was a resident of the State of New York at the date of the institution of the suit and of the issuance of the policy; that ap-

pellee was a resident of West Virginia; that the property covered by the policy was situated in West Virginia; and that the contract entered into with Battillana was made in West Virginia, and that the summons sued out was executed on the Insurance Commissioner of the State of Kentucky in Franklin county, without any allegation that it had ever consented that this might be done. It puts in issue the amount of the loss, and denies that Brode, who delivered the policy, was its agent; denies the alleged agreement with its adjusting agent, Battillana, or that he was its agent, or had authority to make the agreement to pay \$1,000 in settlement of the loss. It further alleges: That, if such promise or agreement was made, it was without consideration, for the reason that the application for the policy of insurance made by appellee to appellant contained the following question: "Q. Is the assured the sole owner? A. Yes." That said appellee thereby represented to the appellant that he was the sole owner of the property to be insured; and that the defendant, relying upon said representation, and without knowledge to the contrary, issued the policy of insurance, which contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest in the property be not truly stated herein." That the representation made by the plaintiff that he was the sole owner was false at the time of making said application, and at the issual of the policy, and at the time of the loss. That appellee was not the sole owner, but owned the property destroyed in connection with his brothers, Johnson and William Hammond, each owning one-third.

Appellee admits in his reply that he was not the sole

owner of the property insured, and alleges that at the time of his application therefor to the agent of appellant, he informed him that the property belonged to himself and his two brothers jointly, and that by agreement between them the business was transacted in his name, and that the agent, with full knowledge of how the property was held wrote the answer to the question in the application. The rejoinder denies the agency of Brode. Upon the trial appellee testified substantially that he went to see Brode, who was an insurance agent, and made application to him for the insurance; that he paid to him the money for the premium, and that in two or three days thereafter he received through mail the policy of insurance, accompanied by a letter in these words: "A. B. Brode, Life, Fire, and Accident Insurance. Notary Public. . . . Loans Negotiated. Huntington, W. Va., March 13, 1896. Mr. Charles Hammond, Louisa, Ky.—Dear Sir: I beg to hand you herewith Mutual Fire policies No. 135,034 and No. 135,035, which I trust you will find in order. Should you desire insurance upon your property up there, or any of your friends, let me know, and I will be pleased to issue you policies. Awaiting your further favors, I am, yours, very truly, A. B. Brode."

He also testified that at the time he procured the policy of insurance from Brode he gave him full information as to the ownership of the property, after which Brode wrote the answer complained of.

Appellee also testified that he entered into a contract of settlement upon which this suit is brought with Battillana in Louisa, Lawrence county, Ky., and not in West Virginia, and that Battillana agreed that appellant would pay to appellee the sum of \$1,000 in full satisfaction of the loss sustained within sixty days after he

should furnish appellant with proof showing the value of the barn, tobacco, and sticks, and the quantity of tobacco removed from the barn after the issual of the policy; that Battillana furnished to him the regular authorized blanks of the company on which to make this proof and in conformity with the agreement, he at once had prepared and forwarded the proof required. He is corroborated in all of these statements by his attorney, who testifies that he registered the letter to the address of the company in New York, and that shortly thereafter he received in response thereto a letter from the company acknowledging the receipt of this proof, in which they denied the liability of the company on the ground that the interest of the insured had not been truly stated, in the contract, the ownership not being solely and unconditionally in appellee.

Both of these witnesses testify that they had no personal acquaintances with Battillana, and only knew that he was the agent of the company from the fact that he so represented himself, and had their blanks in his possession.

The first question to be considered is the plea to the jurisdiction of the court.

Section 71 of the Civil Code provides that: "Actions against an incorporated bank or insurance company may be brought in the county in which its principal office or place of business is situated, or if it arises out of a transaction with an agent of such corporation it may be brought in the county in which such transaction took place."

The uncontradicted testimony in this case shows that all negotiations looking to a settlement of the loss under this policy took place in Louisa, Lawrence county, Ky.; that Battillana had in his possession their blanks, and, after an examination of the property, he agreed to pay \$1,000 in settlement thereof on the conditions named.

In the letter from appellant acknowledging reception of the proof required by Battillana, there is no intimation that he was not their agent; on the contrary, they refused to pay upon the sole ground that appellee had misrepresented the ownership of the property. In the affidavit for a continuance of the case, filed by the local attorney of appellant at the first term after the institution of this action, he says that it will be necessary to have Battillana present at the trial, and that affiant had been informed by the New York attorneys of appellant, and believes and says, that said Battillana is compelled from time to time to go to various parts of the country, and his presence can not conveniently, if at all, be had at that term of the court.

This is sufficient evidence to make it a *prima facie* case of agency on the part of Battillana, and, as the transaction took place in Lawrence county, in this State, we are of the opinion that the court had jurisdiction of the action.

In this connection it is further insisted by appellant that, as the summons was served upon the Insurance Commissioner in Franklin county, it was necessary that appellee should have alleged that license to do business in this State had been granted to appellant, and that it had consented to the service of summons upon the Insurance Commissioner; that, in the absence of such proof, it was entitled to a peremptory instruction.

We cannot agree to this contention, as, if appellant was engaged in the transaction of business in this State, the presumption must be indulged that it was doing so in conformity with the laws of this State, in the absence of pleading and proof to the contrary.

The main ground upon which appellant seeks to evade liability under this policy is that appellee represented himself to be the sole owner in his application for

the policy, whilst the testimony shows that he only had a third interest. But the uncontradicted testimony also shows that at the time he made application for the policy to Brode, from whom he received it, and also at the time he made the agreement with Battillana, the adjusting agent of appellant, he fully informed them of the facts connected with the title and ownership of the property.

This question has been carefully considered by this court in the case of Rhode Island Underwriters' Association v. Monarch, reported in 98 Ky., 305, [32 S. W., 959], in which this court held that the knowledge of the agents of the insurance company of the character and extent of the interest of insured and of the title to the property covered by the policy at the time same was issued was the knowledge of the company, and that they could not thereafter complain of any apparent misstatement in this particular.

It is further insisted that appellee can not maintain this action in his own name; that he could only have recovered one-third of the value of the property destroyed, that being the amount of his interest therein.

The uncontradicted testimony in this case shows that by agreement between appellee and his brothers all the business of this partnership was to be transacted in the name of appellee, and that appellant was notified of this fact before it issued the policy; and section 21 of the Civil Code provides that: "A personal representative, guardian, curator, committee, of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted;" and, as plaintiff was the per-



Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

son with whom and in whose name the contract of insurance was entered into for the benefit of the firm, we are of the opinion that he may bring this action without joining with him his brothers.

For the reasons indicated, the judgment appealed from is affirmed.

CASE 46—ATTACKING CONVEYANCE AS FRAUDULENT—  
APRIL 20.

Bank of Commerce of Buffalo, N. Y. v. Wind-  
muller, Etc.

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APPEAL FROM CARTER CIRCUIT COURT.

1. **CONFLICT OF LAWS—COMMON LAW PRESUMED.**—In the absence of allegation and proof to the contrary the common law will be presumed to be in force in New York.
2. **PREFERENCES VALID AT COMMON LAW.**—A transfer of property by an insolvent debtor in New York to a creditor in that State with the intent to prefer will be held valid in the absence of allegation and proof that the common law has been changed in that regard.
3. **FRAUD.**—The proof in this case fails to show actual fraud.

THOS. W. MITCHELL FOR APPELLANT.

1. When the bill of sale was made and delivered, its officers did not know nor had they reason to believe or even suspect that Brown was insolvent.
2. The bill of sale was made and accepted to secure a "liability contracted simultaneously therewith."
3. As plead and not denied, the written transfers were made, executed, delivered and accepted in the State of New York, of which State Brown was a resident and the appellant and the appellees Windmuller, National Park Bank, Mechanics and Traders Bank were citizens, and Gregory was then a citizen of Ohio.
4. The statutes of Kentucky, which appellees invoke, is not intended

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Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

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to aid citizens and persons of other States in the settlement of their affairs and business transactions at home.

5. Even if it were true (which is denied) that Brown intended to prefer the appellant in past due indebtedness, it was done in New York, and the laws of that State recognize his right to do so. The common law prevails in that State, except in assignments for benefit of creditors, which are regulated by statute, and two-fifths is the limit of preference in such assignments.
6. Again, no judgment was rendered in favor of any appellees or any creditor and until some one has shown a right to recover, it is error to render judgment setting aside sales and conveyances and directing the master to hear proof and audit claims and make report of debts owing by Brown, when the record does not show that any creditor or alleged creditor other than appellees was asserting any claim or demand against him.

WILLIAM H. HOLT ON SAME SIDE.

1. The petitions of Windmuller, Mechanics & Traders Bank and the National Park Bank are not good in failing to charge that the bills of exchange sued on had been presented for payment at the proper time and place, and protest made and notice given of their non-payment.
2. By the laws of New York the transfer to the bank as a preference was permitted; preferences were not illegal at the common law and this court will presume that the common law is in force in New York. The act of 1856, making fraudulent preferences operate as an assignment, was intended to regulate transfers between citizens of Kentucky, and not between citizens of other States.
3. If Gregory was a citizen of this State, if he has a valid debt, then to the extent that the transfers may have been a preference, if at all, he would have been entitled to have it set aside, but as to him alone, there being no other Kentucky creditors. *Matthews v. Lloyd*, 89 Ky., 630; *Merrifield v. Williams*, 17 Ky. Law Rep., 8.
4. If it were true that all liens against the appellant bank were not only for a then consideration but to secure a pre-existing indebtedness and made in contemplation of insolvency and to prefer the bank, yet it would, of course, have a prior lien for the then consideration. *Whittaker v. Garnet*, 3 Bush., 411; *Southwarth v. Casey*, 78 Ky., 395; *McCutchen v. Caldwell*, 13 S. W. R., 1072; *Siler v. Walz*, —.

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Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

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**H. D. GREGORY FOR THE APPELLEE.**

1. The only questions to be determined in a final adjudication of this appeal are: Whether the assignment and transfer made by Andrew Brown on August 19, 1889, of all his property to the appellant Bank of Commerce would, if made by a debtor of this State, be a preference by an insolvent debtor of one creditor to the exclusion of others, and could be declared under General Statutes, ch. 44, art. 2, sec. 1, in force at that time, to operate as an assignment for the benefit of the creditors generally. And if so, as it was made by an insolvent debtor residing in another State, will any citizen of this State be prejudiced by the preferences? Gen. Stats., ch. 44, art. 2, sec. 1; Black's Law Dict., p. 263; O'Neill v. Miller, 2 Bush, 294; McKee v. Scobee, 80 Ky., 127; Terrill v. Jennings, 1 Met., 458; Matthews v. Lloyd, 89 Ky., 625; Anson Contracts (7th ed.), 73; King v. U. S., 27 Ct. Cl., 529; Guire v. O'Daniel, 1 Binney (Pa.), 349.

**THOMAS D. THEOBALD FOR THE APPELLEE, MECHANICS & TRADERS BANK.**

The property conveyed by Brown to the appellant was situated in Kentucky, a considerable portion of it real estate, and there were Kentucky creditors; so as to this property, the Kentucky statute against fraudulent preferences would be applicable. If not, however, the conveyance by Brown was actually fraudulent. O'Neill v. Miller, 2 Bush., 294; McKee v. Scobee, 80 Ky., 127; Terrill v. Jennings, 1 Met., 458; Matthews v. Lloyd, 89 Ky., 625.

**D. K. WEIS AND R. D. DAVIS FOR THE APPELLEES, WINDMULLER AND THE NATIONAL PARK BANK.**

1. It is a settled principle that every nation or State possesses exclusive sovereignty and jurisdiction within its own territory, and the laws of every State affect and bind directly all property whether personal or real. Milne v. Moreton, 6 Burn, Pa., 361; Green v. Van Buskirk, 7 Wall. (U. S.), 151.
2. The title to property located in one State can not be passed by force of the laws of another, except by virtue of the comity which prevails among different nations and States, by force of international laws. State Bank Receiver v. Plainfield Bank, 34 N. J. Rep., 450.
3. No State can, by its laws, directly affect, bind or regulate prop-

Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

erty beyond its territory, or control persons who do not reside within it, whether they be native born subjects or not.

(a) There can be no pretense to say that any foreign nation has a right to require the full recognition and execution of its own laws, in other territories, when those laws are deemed oppressive or injurious to the rights and interests of the inhabitants of the latter. *Lane v. His Creditors*, 17 Martin (La.), 599.

(b) The laws of a foreign State, where the parties are domiciled, will be respected by another jurisdiction, unless they be in conflict with the rights of its own citizens or are in opposition to its policy. *Shannon v. Judd*, 3 Brad., 419.

(c) A statute law of another State will be enforced, if not against public policy, when such law has entered into a contract. *Bancher v. Gregory*, 9 Mo. App., 102.

(d) A State, within whose territory personal property is situated, has entire domain over it. *Rice v. Harberson*, 2 T. & C. (N. Y.), 4.

(e) One State can not dictate to another State how to construe a contract sought to be enforced within its limits. A reasonable limitation of the rule of comity is, that no community shall suffer prejudice by its comity. *Lewe v. Woodfold*, 53 Tenn., 25.

(f) Comity is the purely voluntary act of the nation or State, and is totally inadmissible when the laws of the foreign State or nation are contrary to its policy or prejudicial to its interests. *Miner v. Caldwell*, 37 Mo. App., 350-354.

(g) Comity between different States does not require a law of one State to be executed in another where it would be against the public policy of the latter State. *Faulkner v. Hyman*, 142 Mass., 53.

(h) No State is bound to give effect to the law of a foreign State when to do so will prejudice either the rights of its citizens or the interests of the State. *State Bank Receiver v. Plainfield Bank*, 34 N. J., 450.

(i) No nation or State is bound to recognize or enforce contracts which are injurious to its interests, or welfare of its people, or which are in fraud or violation of its own laws, although valid by the law of the place where made. *Tyler v. Lord*, N. H., 2 N. Eng. Rept., 286; *Hill v. Spear*, 50 N. H., 253; *Smith v. Godpey*, 28 N. H., 253; *Pittsburg & St. L. R. R. Co. v. Rothschild*, 4 Pa. Com. Rep., 109.

Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

(j) No nation is bound to recognize or enforce contracts injurious to its own citizens.

(k) The enforcement by one nation of contracts made under the laws of another, rests on the principle of comity, and can not be so extended as to vitiate the positive legislation of the nation called on to enforce said contract. *Ivey v. Lollard*, 42 Miss., 444.

(l) It has been held by the Supreme Court of New Hampshire that no nation or State is bound to recognize or enforce contracts which are injurious to its interests or the welfare of its people, or which are in fraud or violation of its own laws. *Fisher v. Lord*, N. H., 2 N. Eng. Rep., 286.

(m) A contract, which though valid and would be enforced in the State where it was made, is in violation of a public law of another State will not be enforced on the ground of comity. *Watson v. Murray*, 8 C. Gr., N. J., 257.

(n) A transfer of personal property which is good by the law of the owner's domicile is valid wherever the property may be situated, unless the transfer be against the law or policy of the country where the property is situated. *Frazier v. Frederick*, 4 Zab., N. J., 162.

(o) An instrument, legal where made and at the domicile of the maker, and efficient to transfer his property there, can not dispose of his movables situated in another State, in a manner prohibited by the laws of the latter State inconsistent with its policy and declared to be fraudulent and void. *Varum v. Comp.*, 1 C. E. Gr., N. J., 326.

(p) As to the nature and extent and utility of the recognition of foreign laws respecting the state and condition of persons and things, every nation must judge for itself, but, in no instance is required to recognize them when they would be prejudicial to its own interests or of its subjects. 2 Kent. Com., 457, 458.

(q) It has been said that the general doctrine that a defense or discharge, good by the law of the place of contract is good everywhere is subject to several qualifications, one of which is that the discharge or defense must not be of such character that to recognize it would be in conflict with the duty of the State where it is sought to be enforced toward its own citizens to enforce it.

(r) The laws of sovereignty have no extra-territorial vigor

Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

and are enforced elsewhere, only upon consideration of comity, and these always yield to those higher considerations which demand of every State the protection of its own citizens against unwarranted acts of a foreign power. *Gebhard v. Canada S. W. Ry. Co.*, 17 Blatchford, 66, 416.

(s) If an assignment made in another State and valid there be contrary to the law or settled policy of this State, it will not be enforced here, to the prejudice of our own citizen creditors. *Matthews v. Lloyd*, 11 Ky. Law Rep., 843.

(t) The principle of comity does not require the courts of one State to recognize and enforce to the prejudice of its own citizens assignments made by insolvent debtors under the laws of another State, but they will secure justice to domestic creditors without regard to the foreign law and assignment. *Johnson v. Parker*, 4 Bush, 149; 11 Ky. Law Rep., 843.

(u) A prior assignment in bankruptcy under a foreign law will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt effects found here. Our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control. 2 Kent. (2d ed.), 405, 406, 407; *Harris & McHenry*, Ind. Rep., 1 & 2 vol., 236 and 463; *McNeil v. Colquahan*, 2 Haywood, N. C., 24; *Taylor v. Geary*, Kirby Reps. Com., 313.

(v) Where the laws of two States are brought into conflict, the rule is that the law prevailing where the relief is sought must have the preference. *Runyon v. Groshen*, 1 Beasley, 86; *Teheren v. Brentnall*, 3 Harris (Del.), 262.

(w) The enforcement by one nation of contracts made under the laws of another rests on the principle of comity, which can not so far extend as to violate the positive legislation of the nation called on to enforce contracts, and in no case should it be carried to such an extent that the nation or its subjects will be in any way prejudiced thereby. *Thrasher v. Everhart*, 3 Gill & J., 234; *Parnell v. Dwight*, 2 Mass., 88; *Kentucky v. Bradford*, 6 Hill, 526.

4. The act of 1856 to prevent fraudulent assignments, in trust for creditors, does not render the sales, &c., void, but merely declares that they shall operate as an assignment and transfer of all the property and effects of the debtor and shall inure to the benefit of all his creditors. *Given v. Gordon*, 3 Met., 539.

Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

5. A sale of property made by a debtor in contemplation of insolvency, and with the design to prefer some of his creditors, to the exclusion of others, operates of itself, as an assignment and transfer of all his property and effects for the benefit of all his creditors, and can not be defeated by some of the creditors suing out attachments subsequently, though before suit, under the statute by others. *Shouse v. Utterback*, 2 Met., 53.
6. Where one creditor files his petition within the prescribed time to set aside a conveyance to preferred creditors, all other creditors have a right to file their claims subsequently, and become parties to the proceeding whilst pending, and after this has been done, the plaintiff can not dismiss his petition and thereby defeat their claims; nor can the court so defeat them by filing it away, never to be docketed again. *Sawyers v. Langsford*, 5 Bush, 539.
7. Attaching creditors acquire no prior lien, by virtue of their attachments, when the property and effects of the debtor have inured to the benefit of his creditors, under the act of March 10, 1856. *Given v. Gordon*, 3 Met., 539; *Whittaker v. Garnett*, 3 Bush, 410.
8. Under the act of 1856, to prevent fraudulent assignments, &c., a suit, by one creditor within the time prescribed if prosecuted to a successful termination, inures to the benefit of all creditors whether they sue or not. *Roberts v. Phillips*, 11 Bush, 15.

WILLIAM H. HOLT FOR THE APPELLANT IN A PETITION FOR A MODIFICATION OF THE OPINION.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

For several years after 1881, Andrew Brown was a dealer in lumber in Buffalo, N. Y., and, through agents, was engaged in removing the timber from a tract of land owned by him in Carter county, Ky. The timber upon that tract having been exhausted, he purchased, in 1885, the timber upon another tract belonging to appellee Gregory and Mrs. Clara E. Smith, and removed his machinery to that tract of land. His business in this State was transacted entirely through agents. In the spring and summer of 1889 he had drawn a number of drafts for sales

Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c.

of lumber upon Gorton & Co., of Buffalo, and Pagenstecher & Co., of New York City, in favor of himself, which were accepted by the drawees, and by them made payable at designated banks in the city of New York, and were then endorsed in blank by Brown and sold through brokers to raise money to carry on his business. He was, and has for a number of years been a depositor with the Bank of Commerce of Buffalo, appellant here. On August 15, 1889, one of the drafts on Pagenstecher & Co. matured, and was dishonored. Upon August 19, 1889, Brown executed to the appellant a mortgage upon the tract of land owned by him in Carter county, recited to be to secure the payment of \$10,000. It appeared that, in December, 1885, he had conveyed this land to one Frank F. Brown, his second cousin and employe, who, on September 10, 1889, conveyed it to appellant. He also executed a bill of sale on the same date of all timber, machinery, and other personal property owned by him in Kentucky, and the benefit of all contracts held by him with the Eastern Kentucky Railway Company, which was recited to be for a valuable consideration. Fifteen days afterwards, appellee Windmuller filed his petition in equity upon three drafts,—two drawn on Pagenstecher & Co., aggregating \$11,000, and one upon Gorton & Co., for \$3,000; setting up the mortgage and bill of sale referred to, alleging that they were made with intent to defraud creditors, and to hinder and delay them in the collection of their claims, and were executed in contemplation of insolvency, and with the design to prefer one or more creditors, to the exclusion, in whole or in part, of other creditors; praying for a judgment against the property, that the bill of sale be set aside as fraudulent, and that the mortgage be adjudged to operate as an assign-



ment for the benefit of creditors, under the act of 1856. Similar suits were instituted by various other creditors, appellees herein, upon similar paper; a similar suit was instituted by appellee Gregory for \$1,000, alleged to be due him upon a contract; and the cases were consolidated, and judgment rendered. By the judgment, the demurrers to the petitions were overruled. The deeds from Andrew Brown and Frank F. Brown, and from the latter to appellant, and the mortgage and bill of sale to appellant, were adjudged to be fraudulent and void as to the creditors and Andrew Brown, to have been made in contemplation of insolvency, and in order to prefer appellant upon a pre-existing indebtedness to it, and to operate as an assignment to appellant for the benefit of all the creditors of Andrew Brown. The case was referred to the commissioner to hear proof and audit claims against Brown; and appellant was ordered to pay into court \$14,000, upon the bond executed by it for the release of the property.

It is urged that the court erred in overruling the demurrers, in adjudging the conveyances fraudulent and void, in adjudging that the transfer was made in contemplation of insolvency, and to prefer appellant in a pre-existing claim to the exclusion of other creditors, in directing a reference to the master to hear proof and audit claims, and in requiring it and its surety to pay into court the \$14,000.

Upon an examination of the record, there appears no sufficient evidence to support the charge of actual fraud. But it seems sufficiently apparent that the transfers were made in contemplation of insolvency, and with the design to prefer the appellant bank. At the time of the transfer, Brown owed the bank over \$100,000; and, while the bank a few days later advanced him some \$20,000 more, that appears to have been done with a view to enable him to rea-

lize upon the property included in the transfer. The bank does not sufficiently show—and the burden was upon it to do so—that the transfers were made to secure it for the advances thereafter made. That there was a design to prefer appears from the evidence of the appellant's cashier.

But it does not follow that the appellees are entitled to the relief they sought. It must first be ascertained whether they have debts against Brown; and, second, whether the transaction in New York operates as an assignment for their benefit.

Waiving, for the purposes of this opinion, the question of the sufficiency on demurrer of the petitions, and assuming that there is no contest over the claims of any appellee but Gregory, the question arises whether the Kentucky act of 1856 affects the New York transaction so as to make it operate as an assignment for the benefit of the New York creditors. All the appellees but Gregory are non-residents of this State. The transaction must be assumed to have been valid according to the laws of New York, for preferences were lawful at common law; and the common law is presumed to prevail in States where the contrary does not appear. It follows that the transfers will be treated by this court as valid, so far as the citizens of other States are concerned.

Said this court, through Judge Holt, in *Matthews v. Lloyd*, 89 Ky., 629, [13 S. W., 107]: "At common law, a debtor had a right to prefer a creditor either by a payment or an express preference in a deed of assignment. He has a right to pay his debt, and it is only by virtue of statutory law that such a payment can be held invalid, and the creditor be compelled to surrender his advantage. In the absence of any showing of the existence of such a statute in another State, it must be presumed that the

common law is in force there. *Miles v. Collins*, 1 Metc., (Ky.), 308; *Honore v. Hutchings*, 8 Bush, 687." And again pages 630, 631, 89 Ky., [and page 107, 13 S. W.]: "The rules of the common law govern the transaction, and, when so considered, it is not invalid, because a payment of a pre-existing debt in view of coming insolvency is not forbidden by them. It is urged that such a preference is contrary to the statute of this State, and will not, therefore, be upheld by its courts. It is true, comity does not require one State to violate its own laws to enforce those of another. Such a preference is not fraudulent or void, however, under our statute. Upon the contrary, it operates as an assignment, not only of the particular property embraced by the preference, but of all the debtor owns for the payment of his debts, *pro rata*, provided advantage be taken of it in the manner and within the time prescribed by the statute. It merely inures to the benefit of all the creditors, if they, or any of them, so ask in proper time and manner. It is a privilege given them. If an assignment, made in another State, and valid there, be contrary to the law or the settled policy of this State, it will not be enforced here, to the prejudice of our own citizen creditors." See also, *Johnson v. Parker*, 4 Bush, 149.

All the appellees, except Gregory, being confessedly citizens of other States, it follows, therefore, that, in the present state of the record, the statute can not be held to operate in their favor.

The validity of the claim of Gregory is in dispute, and the judgment makes no mention of his claim. As to his claim, therefore, there is nothing for us to act upon.

The judgment is reversed, with directions for further proceedings consistent herewith, allowing appellees to amend, if desired, both as to the New York law and as to demand and protest upon the bills of exchange sued upon.

## CASE 47—ACTION ON SUPERSEDEAS BOND—APRIL 21.

## Welch, Etc. v. Welch, Etc.

## APPEAL FROM MARION CIRCUIT COURT.

1. **SUPERSEDEAS BOND—DAMAGES ON.**—In an action on a supersedeas bond given to stay a judgment for the recovery of shares of stock in a manufacturing corporation the plaintiff can recover damages resulting from a deterioration in the value of the stock caused by mismanagement by the directors.
2. **SAME—ATTORNEY'S FEES.**—Attorney's fees incurred in prosecuting an appeal do not constitute an element of damage in an action on the supersedeas bond.

## JOHN McCHORD FOR THE APPELLANT.

Both the depreciation in the value of the mill stock and a reasonable attorney's fee in the prosecution of the appeal are elements of damage in an action upon a supersedeas bond. *Mahlman v. Williams*, 89 Ky., 285; *Buckner, &c., v. Borgard*, 8 Ky. Law Rep., 701.

## J. P. THOMPSON FOR THE APPELLEE, E. R. LANCASTER.

The loss on account of the mill stock was caused by the management and not by the appellees.

## BEN SPALDING FOR THE APPELLEE, E. R. WELCH.

The damages recoverable in an action on a bond must be the natural, proximate and reasonable result of the thing done. 5 Am. & Eng. Ency. of Law, 5 and note 2 on page 6; *Lawson, Rights, Rem. & Pr.*, vol. 3, sec. 1030; *Buckner, &c., v. Borgard*, 8 Ky. Law Rep., 701; *Worth v. Smith*, 5 B. M., 504; *Talbert v. Morton*, 5 Litt., 327.

## JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

In April, 1895, D. W. Welch died, domiciled in Marion county intestate and without issue. His widow, E. R. Welch, qualified as administratrix of his estate. The ap-

praisers appointed by the county court set apart to the widow seven and one-half shares of stock in the Lebanon Roller Mills, in lieu of all personal property.

Afterwards, in an action to settle the estate of D. W. Welch, appellants, heirs of D. W. Welch, were made parties, and sought and obtained judgment of the Marion Circuit Court directing a sale of these seven and one-half shares of mill stock for the benefit of the estate of D. W. Welch; the court thereby adjudging that the allotment of these shares to the widow in lieu of other property was error. The judgment of the circuit court was superseded by the widow, E. R. Welch, and an appeal was prosecuted to this court.

In February, 1898, the judgment of the Marion Circuit Court directing a sale of the shares of stock was affirmed by this court. *Welch v. Welch*, 19 Ky. L. R., 1945 [44 S. W., 960]. Upon the affirmance of that judgment, the appellee Lancaster, who was the surety on the supersedeas bond, brought this action, with attachment against appellee E. R. Welch, for indemnity on account of his liability as surety on the bond. In that action the appellants became parties, and by cross petition sought to recover damages on the supersedeas bond. The amount claimed is \$727.50, the total value of the mill stock at the date of the judgment superseded. It is alleged that the mill stock has, since the rendition of the judgment of sale and the execution of the supersedeas bond, become utterly worthless by reason of mismanagement of the directors of the mill company. Appellants also asked for judgment for \$75 for attorney's fee on the appeal. The court sustained a demurrer to this cross petition of appellants, and dismissed same; and from that judgment this appeal is prosecuted.

We are of opinion that, in so far as the cross petition

sought to recover attorney's fees on the appeal, no cause of action is stated. As to that, the supersedeas bond does not render either of appellees liable. The demurrer to the cross petition to that extent was properly sustained.

We are called upon to determine whether appellees are liable for the value of the stock at the date of the bond (\$727.50), upon the allegation, admitted to be true on demurrer, that it is now worthless, and rendered so by the mismanagement of the mill company since the execution of the bond. The conditions of the bond are: "Do hereby covenant to and with the appellees, etc., that the appellant will pay to the appellees all costs and damages that shall be adjudged against the appellant on the appeal, and also that they will satisfy and perform the said judgment in case it shall be affirmed, . . . and also pay all damage which, during the pendency of the appeal, may accrue by reason of the appeal."

There is no question as to the payment of costs and damages adjudged in this court, nor as to the performance by appellees of that judgment, i. e., surrendering the seven and one-half shares of stock for sale; but the question arises upon the last clause, "and also pay all damages which, during the pendency of the appeal, may accrue by reason of the appeal."

By the allegations of the cross petition, which are taken as true, the stock was worth \$727.50 at the date of the judgment and bond; and, by reason of mismanagement of the affairs of the mill company during the pendency of the appeal, the stock became worthless.

We are of opinion that this item of damage is covered by the condition of the bond. True, it is alleged that the direct cause of the deterioration of the value of the stock was caused by the directors of the company; but it is evi-

dent that this damage or loss in value of the stock would not have affected appellants, but for the delay caused by the supersedeas and appeal. If the stock had been sold under the judgment superseded, the mismanagement of the mill company would not have affected appellants. The fund would have been in court, subject to distribution or subject to the judgment of this court on the appeal. If appellee could control the stock and prevent its loss in value, she should have done so. If its value depended on the action of others over whom she had no control, it seems that, by the execution of the bond and the consequent suspension of proceedings under the judgment, she elected to make the action of those who could control the value her action; and she should abide the result.

The case of *Mahlman v. Williams*, 89 Ky., 282, [12 S. W., 335], sustains this view. In that case a contest arose as to the priority of two claimants of a fund in the hands of a garnishee. The court adjudged Williams to have priority, and awarded execution against the garnishee for the amount due. The other creditors, with Mahlman, surety, superseded that judgment, and prosecuted an appeal. The judgment of the circuit court was affirmed; but, pending the appeal, the garnishee became utterly insolvent. This court held that the surety on the supersedeas bond was liable, as but for the bond the debt could have been collected from the garnishee before he became insolvent.

So in the case at bar, from the pleadings it appears that but for the bond the stock would have sold for its value (\$727.50), and its subsequent deterioration in value would not have affected appellants.

In the case, *supra*, the court, referring to the case of *Worth v. Smith*, 5 B. Mon., 505, said as to that case, and as an illustration of the case there under consideration:

"If such had been the case, and a bond executed preventing Worth from selling the boat, there could be no question as to the liability of the surety on the supersedeas bond for the damages sustained by reason of the supersedeas."

We are of opinion that the cross petition of appellants states a cause of action as to authorize a recovery for the value of the shares of stock, and the demurrer thereto should have been overruled.

For the reasons indicated, the judgment is reversed, and cause remanded for further proceedings consistent herewith.

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CASE 48—ACTION FOR COMMISSION—APRIL 22.

Jones, Etc. v. Brand.

APPEAL FROM LAW AND EQUITY DIVISION OF JEFFERSON CIRCUIT COURT.

PRINCIPAL AND AGENT—SUB-AGENT.—An agent whose power is limited to the collection of rents, payment of taxes and the taking of bids and the submission of them to the principal has no power to create a sub-agent for the purpose of effecting a sale of the property, and such sub-agent can not recover from the principal commission for making the sale.

RICHARDS AND RONALD FOR THE APPELLANT.

1. Dr. Curran Pope was not the agent for Mr. Jones for the sale of the property in controversy, and Pope did not employ appellee as sub-agent to make the sale.
2. Dr. Pope's authority to take bids had been exhausted prior to the date at which the sale was made and never did include the purchasers, Crutcher & Starks.
3. Brand has done nothing to earn the commission in this case.
4. The court erred in permitting Mr. Brand to read from his letter-book the supposed copy of the postal of October 18, 1893, addressed to Mr. Jones. It related to transaction between plaintiff and a party who was dead at the time the plaintiff was testifying.



Civil Code, sec. 606; Hobbs v. Russell, 79 Ky., 61; Viley v. Pettit, 96 Ky., 576.

5. Even if Pope had authority to sell, he could not delegate it to Brand. *Delegatus non potest delegari*. Mechem Agency, secs. 184, 185, 197, 964; Story Agency, secs. 14, 109; 1 Am. & Eng. Ency. of Law, 368; Barrett v. Rhem, 6 Bush, 466; Rudd v. N. C. & St. L. R. R. Co., 7 Ky. Law Rep., 823; Atlee v. Finck, 75 Mo., 103; Werner v. Marton, 11 How, 224; 2 Am. & Eng. Ency. of Law, 588.
6. No judgment can be rendered against a non-resident executrix who has not qualified in this State. Baker v. Smith, 3 Met., 265; Story on the Conflict of Laws, sec. 513.

#### BULLITT & SHEILD FOR THE APPELLEE.

1. "The appellee contends that he had express employment from Jones and from Curran Pope, as authorized agents; and that the appellee did make the sale, acting under such authority and under a promise on the part of Jones and his agent, Pope, to be paid a commission for his service rendered."
2. "The appellee contends that he performed the service with full knowledge on the part of Samuel H. Jones that he did perform the service; that he had procured the purchaser of the property to whom Jones afterwards sold, with full knowledge on the part of Jones that he was claiming and entitled to commissions; with a full knowledge on the part of Jones as to what the commissions were; that it is true that Jones, after the appellee, Brand, had brought him into contact with a purchaser, took up the negotiations and closed the sale in person, but that Jones did it with the understanding that he was compelled under the law, and in point of fact, to pay the appellee the commissions which the appellee had earned."
3. It is a plain principle of law, that where the agent is employed to procure a transfer but without the power to execute a contract, that he is entitled to his commissions when he procures the purchaser with whom the party contracts, and a purchaser who is ready and willing to perform his contract. This is a well-settled doctrine of Kentucky. Coleman v. Meade, 13 Bush, 358; 27 N. W. R., 301; First Philadelphia, 382; 38 Am. Rep., 441; 23 W. Va., 229-235.
4. Where the amount of commissions is not fixed, the parties are presumed to have acted in reference to the custom. 83 Pa. St.,

Jones, &c., v. Brand.

- 138; *Barker v. Craig*, Litt. Sel. Cases, 213; — *Am. & Eng. Ency. of Law*, 1096, 1101.
5. Where a broker furnishes the name of a purchaser to the owner, the broker is entitled to his commissions when the contract is finally made with the purchaser. *Green v. Bartlett*, 14 C. B. N. S., 681; 36 *Law Journal*, C. P., 262; *Ency. of Law*, "Brokers," vol. 2, p. 583; 38 *Am. Rep.*, 441; 23 *W. Va.*, 229; 27 *Kan.*, 246; 33 *N. J. Law*, 247; 44 *P.*, 511; 60 *Ill. App.*, 592.
6. It is the principal's duty when he knows the agent has property for sale, to inquire whence the information came by which the purchaser was procured. 51 *N. Y.*, 124; 29 *Vt.*, 127; 7 *Daly*, 243; 2 *Am. & Eng. Ency. of Law*, "Brokers," 563; *Viley v. Pettit*, 16 *Ky. Law Rep.*, 650.
7. Where beneficial services have been performed by one person for another who has rendered them and suffered them to proceed, a promise to pay for them may be implied; the law in that case considers the circumstances as evidence from which a request may be presumed. *James v. Bixby*, 11 *Mass.*, 34; *Hatch v. Purcell*, 21 *N. H.*, 544; *Livingston v. Rogers*, 1 *Caines (N. Y.)*, 588; *Low v. Conn. Railroad*, 46 *N. H.*, 284; *Hicks v. Burhasu*, 10 *Johns.*, *N. Y.*, 243; *Hite v. Brannon*, 5 *Daly*, 1; *Westgate v. Monroe*, 100 *Mass.*, 227.
8. The doctrine *delegatus non potest delegari*, is not applicable to this case because Jones the principal referred Brand to Pope as his general agent without authority.

SAME COUNSEL FOR APPELLEE IN A SUPPLEMENTAL BRIEF.

BULLITT & SHEILD AND JOHN W. RODMAN FOR THE APPELLEE IN  
A PETITION FOR A REHEARING.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

This suit was instituted by appellee to recover commissions alleged to be due him as the duly-authorized agent of Samuel H. Jones, for his services in making a sale of the property of Jones situated on Fourth and Jefferson streets, in the city of Louisville, to Crutcher & Starks.

The executrix of Jones (who has died since the date of the alleged services) denies that appellee was the agent of her testator for the sale of said property; that he ever promised or agreed to pay such commissions, or any part

thereof; or that plaintiff rendered any services in effecting the sale of the property, with the knowledge and consent of her testator.

By agreement, a jury was waived, and both the law and facts of the case submitted to the court, who rendered judgment in favor of appellee for \$1,975; and to reverse that judgment this appeal is prosecuted.

Samuel H. Jones resided in Philadelphia, and was the owner of certain real estate situated on Fourth street, in Louisville, Ky.

For many years Judge Pope and his son, Dr. Curran Pope, had acted as his agents in collecting the rent, paying the taxes, and looking after the repairs upon the property. Some time previous to October, 1892, appellee, who was at that time engaged in the business of real estate agent, addressed Jones a letter of inquiry in regard to his property in Louisville, Ky., and Jones' response is filed by Brand as an exhibit, and is in these words:

"Aldin Hotel, Chestnut Street, Phila., Pa., October 19, 1891. John H. Brand & Co., Louisville, Kentucky—Dear Sirs: Your favor of 2d duly received. Regarding the expiration of leases, I must refer you to Judge Pope or his son, Dr. Curran Pope, who are thoroughly conversant with all details of my Louisville property, and are my agents in all matters concerning said property.

"I by no means wish to put the property on the market, but, as I wrote, would entertain propositions for improvement of same under long lease. I have notified Dr. Curran Pope of your inquiry, and he will give you the data you wish. Very truly, yours, Saml. H. Jones.

"P. S. Your last letter forwarded to me from Kennebunkport. Have notified Dr. Curran Pope of its contents."

After the reception of this letter, it appears, from the

testimony of Dr. Pope, that appellee came to see him, and said to him that he thought he could sell the property; that he had an offer upon it; and Pope testifies, in substance, that he said to him that, in case he could find a purchaser for the property, if he would bring the bid to him he would submit it to Jones, and, if accepted, would divide the commissions with him. Appellee subsequently reported two bids to Dr. Pope, neither of which, however, was accepted.

During these negotiations, Dr. Pope addressed this communication to appellee:

"Louisville Ky., Sept. 5, '93. Mr. John H. Brand, City. —My Dear Mr. Brand: It was with some surprise that I learned from you that some other agent had offered Mr. Jones' property for sale. As you well know, I am Mr. Jones' representative, and it is through me only that any such authority might be obtained. I assure you that I am surprised, and would like to know who the party is, and by what authority he acts, as he has received none from me. Mr. Jones is particular about having his property hawked about the market, and I have never authorized any one to act for Mr. Jones but myself. The only person authorized to act with me is yourself, and any other person who presumes to act must be laboring under a delusion, for which he needs medical treatment.

"I have been approached by many real estate agents, but have always refused to act with them unless they brought me a written proposition. This has never been done. You are the only one at the present time that has any authority to act in conjunction with me.

"You may show this letter to your party, but I would request you and him to keep the matter quiet. Kindly

let me hear from you at the earliest possible moment and oblige, Your friend, Curran Pope. (Dictated.)”

About the 11th day of October, 1893, Dr. Pope contracted to sell this property to other parties, without conference with appellee; but, before the matter was consummated, a publication appeared in one of the city papers stating that the property had been sold. Both appellee and Crutcher & Starks were occupying it at the time. Appellee, after seeing this publication, went to see Dr. Pope in regard to the truth of the publication, and Pope told him that negotiations to that effect were pending; and it appears that, late in the afternoon of that day, he went into the storehouse of Crutcher & Starks, and was discussing the property and the sale, and that he stated to them that he had been informed by Dr. Pope that the deal had not been closed, and suggested to them that they telegraph Jones, in Philadelphia, offering an advance for the property of \$10,000 over and above the reported price at which it had been sold. This suggestion was acted upon, and Mr. Starks followed it up by going to see Jones with regard to the property, and finally purchased it.

The question is, was Brand the authorized agent of Jones to sell the property, and did he do it? There is no contention on the part of appellee that he ever had any direct communication with Jones in regard to the matter, other than the letter, *supra*; and there is nothing in this letter to indicate that Jones employed him as agent to sell the property, or in any other capacity. The question, therefore, is whether appellee had authority from Dr. Pope, the recognized agent of appellant, to negotiate the sale of the property in behalf of the owner, and whether Pope himself had authority to make such agreement. Pope testifies that he did not have any authority to sell

the property, and no authority to employ appellee or any other person in this capacity; that he was only authorized, in case he had any bids for the property, to submit them to Jones; and that he only authorized appellee, in the event he found a bidder, to submit the proposition to him, with the intention of dividing the commissions with him in the event a sale was effected.

The testimony shows that Dr. Pope, under what he regarded as authority (through a telegram from Jones dated October 11th), attempted to sell the property to Kleinhans & Simonson, and that appellee, having ascertained this fact, without a shadow of authority from Pope, suggested to Crutcher & Starks that they might prevent the consummation of the trade by a direct offer to Jones of an advance of more than \$10,000. It can not be contended, in the face of these facts, which are testified to by all the witnesses, that, at the time he made the suggestion to Crutcher & Starks, he was acting as agent of Dr. Pope, because he was really attempting at that time to thwart an effort on the part of Pope to sell to another party. This is the only connection he seems to have had with the sale to Crutcher & Starks.

It was held in a litigation in the Federal court which grew out of the attempted sale by Pope to Kleinhans & Simonson, that Pope himself had no authority from Jones to conclude a sale of the property; and there is no testimony which shows that Jones ever authorized the appointment of any other agent by his agent Pope. "It is a general rule of law, in the absence of express or implied authority to employ a subagent, the trust committed to the agent can not be delegated to another so as to affect the rights of the principal." See Mechem on Agency, sec. 185. "But if the agent, having undertaken to transact the business of

his principal, employs a subagent on his own account, to assist him in what he has undertaken to do, he does so at his own risk, and there is no privity between such subagent and the principal." Story on Agency, sec. 14. "An agent who has bare power or authority must execute it himself, and can not delegate his authority to another." 1 Am. & Eng. Enc. Law, 368, and cases there cited. "An agent, ordinarily without express authority, or a fair presumption of one, growing out of a particular transaction or the usages of trade, has not the power to employ a subagent to do the business, without the knowledge and consent of the principal. The agency is a personal trust, for a ministerial purpose, and can not be delegated; for the principal employs the agent on the opinion he has of his personal skill and integrity, and the latter has no right to turn his principal over to another of whom he knows nothing. To entitle a broker to commission for his services, he must make it appear that the services were rendered under the employment and retainer by the principal, or that the latter accepted his agency and adopted his acts." See Barrett v. Rhem, 6 Bush, 466; Rudd v. N., C. & St. L. Railroad Co., 7 Ky. Law Rep., 823; Birch v. Powell, 15 Ky. Law Rep., 445; the Supreme Court of the United States, in Warner v. Martin, 11 How., 224.

The ground on which plaintiff seeks to recover in this action is that he sold the property as agent of Jones, and that Jones, during his lifetime, promised and agreed to pay his commissions on said sale. It seems to us the proof clearly shows that Jones never at any time employed appellee to render any services for him whatever in the sale of this property; that the authority to Dr. Pope was a limited authority to obtain bids, which were to be submitted; and that Pope had no authority from

Jones to employ any other person to assist him in this matter, so as to make Jones responsible therefor. The testimony of both the Starks conclusively shows that appellee, in suggesting to them that they might thwart the designs of Dr. Pope to sell the property to another party, could not have been acting under the authority of Dr. Pope, as he was endeavoring to thwart the very purpose which Pope had in view.

It is evident, from the proof in the case, that the telegram of Crutcher & Starks, and their subsequent actions, were suggested by appellee, but that, in making these suggestions, he was not acting as the agent of Jones, and had no valid or legal claim against him growing out of the sale of the property.

For the reasons indicated, the judgment must be reversed, and remanded for proceedings consistent herewith.

CASE 49—ACTION ON COMPROMISE AGREEMENT—APRIL 22.

Pullins' Administrator v. Smith.

APPEAL FROM MADISON CIRCUIT COURT.

1. ADMINISTRATORS—POWER TO COMPROMISE.—Before a compromise entered into by a personal representative of claims against his decedent will be enforced by a court of equity it must appear either (1) that the compromise was authorized in advance by the court, or (2) the nature of the claim must be so definitely alleged that the court can determine that the effected compromise was beneficial to the estate, and a proper one for the personal representative to make in the exercise of a reasonable discretion for the protection of the interests committed to him.
2. SAME—PLEADING.—A pleading asserting such a claim is defective

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Pullins' Admr. v. Smith.

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if it fail to allege with particularity the time and terms of such alleged compromise.

W. I. WILLIAMS FOR THE APPELLANT.

1. Before the defendant can maintain its action upon the set off the claim must have been presented to the administrator verified in the manner provided by law. *Warfield v. Gardner's Admr.*, 79 Ky., 583; *Swift Iron & Steel Works v. Schulte*, 8 Ky. Law Rep., 787; *Usher's Exrs. v. Flood*, 12 Ky. Law Rep., 721.
2. An allegation of a transaction with an intestate in his life-time made in a bill against his administrator is not to be taken as assumed because it is not answered by the administrator. *Ball v. Townsend*, Litt. Selec. Cas., 325.

J. TEVIS COBB AND J. A. SULLIVAN FOR THE APPELLEE.

1. As the reply to the defendant's answer was not made a part of the record, this court will presume that the action of the lower court in refusing it to be filed was proper; and in the absence of such reply, the allegations of the answer must be taken as true.
2. In the absence of a reply showing that the claim set up in the answer was not properly verified, this court must assume that it was verified as required by law. *Thomas' Exr. v. Thomas*, 15 B. M., 177; 19 Ky. Law Rep., 97; *Nutall's Admr. v. Brannin's Exr.*, 5 Bush, 11; *Rogers v. Mitchell*, 1 Met., 22; *Terrell v. Rowland*, 86 Ky., 79-80; *Warfield v. Gardner's Admr.*, 79 Ky., 583.
3. The case of *Ball v. Townsend*, Litt. Selec. Cas., 325, relied on by counsel for the appellant has no application whatever to this case. That decision was not the common law, has never been followed by this court, and is contrary to the provisions of our Code, which states that every material allegation of a pleading must be taken as true unless specifically traversed. Civil Code, sec. 126.
4. The case of *Usher's Exrs. v. Flood*, 12 Ky. Law Rep., 72, is not in line with the facts of this case. In that case the point was made before judgment, and it appears that no verification as required by law had been made. See also *Holland v. Lowe's Admr.*, 19 Ky. Law Rep., 97.
5. The defense set up in the answer was not a claim against the estate of decedent. The gravamen of the answer is that the defendant had had a claim against the decedent which had been liquidated by compromise with the administrator.

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Pullins' Admr. v. Smith.

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JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Appellant brought suit in equity against appellee, asking a personal judgment on a note for \$852.65 executed by appellee to his intestate for a tract of land, and to enforce the lien on the land retained in the deed to secure its payment. After admitting the execution of the note, the defendant, in his answer, set up the following defense in bar of the action: "Further answering, defendant says that when this action was instituted in the Madison Circuit Court, and prior thereto, this plaintiff's intestate, the said Alva Pullins, was indebted to this defendant in a large amount of money, for services rendered by this defendant to the said intestate from the year 188— to the year 18—, inclusive, at the said intestate's special instance and request; that the said Pullins, by an instrument of writing duly signed and executed, and recorded in the Garrard Circuit Clerk's office, engaged his said services, and promised to pay him therefor a reasonable compensation; that, at the time of the institution of this action, he still owed him a large amount of money; that this defendant, on the ——— day of ———, 1896, presented the said claim to this plaintiff, as administrator of the said Alva Pullins; that it was distinctly agreed, by and between this plaintiff and defendant, then and there, that the said claim was valid and just, and that, in payment and settlement of same, this note and interest sued on in this action should be paid and canceled, and the said lien retained to secure its payment should be released, and plaintiff was to pay to this defendant \$400 additional, or apply same to the cancellation and payment of a note held by Harrison Burnam's committee, and upon which an action has been instituted in this court; and that, as a further consideration for the said settlement of the defendant's said claim against the

said intestate in the manner aforesaid, this defendant was to release the said Alva Pullins as security on about a \$1,900 note to B. L. Price, and on about a \$1,100 note to James Estill.

"He says that he has complied with the terms of the said settlement by releasing the said Alva Pullins as security on the said note of this defendant to B. L. Price, and by releasing the said Alva Pullins as security on the said note to James Estill; and that he has in every respect complied with the terms of said settlement, and that the said administrator has failed to release the said lien and pay the said \$400."

It will be observed that appellee does not allege what services he rendered the intestate, or what they were worth, or what he had been paying him; and, from all that appears in the pleadings, only a nominal sum may be due him, if anything. He does not allege that he was insolvent, or that there was any danger of the intestate's estate losing anything as his surety, or that he expended anything in securing its release on the notes referred to. So, for all that appears, the personal representative, for a nominal consideration, released the debt, amounting to about \$1,200, and assumed, in addition, a liability of \$400 for the estate.

Appellant moved the court to require the blanks in the plea to be filled. This the court refused to do—and as we think, improperly. For it, at least, would have given some idea of the nature of the claim, more than is conveyed by the pleading as it stands. The personal representative had no knowledge of these facts, and it was peculiarly important to him to have the blanks filled, that he might properly understand what he was to answer.

After overruling appellant's motion that the blanks in

the plea be filed, the court gave appellant ten days to file a reply. He did not file his reply in the time allowed, and when he subsequently tendered it the court refused to allow it to be filed, on the ground that it was not tendered in time; and, the action being then submitted, gave judgment in favor of appellee, canceling the note sued on, and requiring appellant to pay the \$400 above referred to. The reply tendered by appellant is not made a part of the record, and so the only question before us is, did the allegations of the answer which we have quoted above warrant the judgment?

In *Clay v. Williams*, 2 Munf., 105, [5 Am. Dec., 453], it was held that: "A court of equity will not assist in carrying into effect compositions of claims by executors or other fiduciaries, unless the party praying it will first unfold and disclose the whole circumstances of the case to the court, that it may see there has been no fraud and that everything was fair." And, on page 460 [5 Am. Dec.], the court say that "such compositions are not favored in equity." And the appellant was refused relief because he failed to show "the particulars on which such composition is founded." This case only applies a well-known rule of equity scrutinizing the acts of fiduciaries, and never enforcing their contracts against those they represent, unless "within the range of a reasonable discretion as to the true interests of the estate." Schouler, on Executors, sec. 298.

For all that appears in this case, the administrator was guilty of a *devastavit* in making the alleged agreement. He had no power to waste the estate of his intestate; and, if he did agree to waste it, a court of equity will not enforce his contract against the estate. In order that this alleged contract may be enforced in a court of equity, it must be shown that it was to the interest of the estate, and a

proper one for the executor to make, in the exercise of a reasonable discretion, for the protection of the interests committed to him.

Pursuant to the principles above referred to, our statute provides: (Kentucky Statutes, sec. 3882): "In actions for the settlement of decedents' estates, the court may direct the sale of choses in action, including judgments, and may authorize the personal representative to compromise claims growing out of contract or tort due the estate, as well as claims on contract or tort against the estate; and a personal representative may compromise and settle any claim or demand for damages growing out of injury to or the death of the decedent."

In *Bitteler v. Bitteler's Adm'r*, 13 Ky. Law Rep., 368, an administrator agreed with one who was surety for the intestate to release him from liability on the notes, in consideration of his paying a debt due the estate by another. It was held that the administrator had no power to bind the estate by such an agreement, and that, though he might be liable personally for the amount so paid, the estate was not.

It is not averred that the alleged compromise was authorized by the judgment of the court, and it clearly should not have been enforced, unless facts were alleged sufficient to authorize the court to direct the compromise to be made if presented to him before it was made. *Geigers v. Kaigler*, 9 S. C., 401.

Equity never lends its aid to the enforcement of contracts unless they appear fair. This doctrine is peculiarly applicable to suits against fiduciaries: In *Pomeroy on Contracts*, section 180, the rule is thus stated:

"Contracts whose provisions, if carried into operation, would constitute or require a breach of trust by the party

Wood, &c., v. Friendship Lodge, &c.

performing ..... will never be specifically enforced by a court of equity.....If the agreement does not involve any actual breach of trust, still a court of equity is always reluctant to enforce an agreement against trustees which may injuriously affect their interests or those of their beneficiaries."

On the return of the case to the lower court, appellee will be allowed to fill the blanks in his answer and amend his pleading, if he desires to do so; appellant will then be allowed a reasonable time to file reply.

Judgment reversed, and cause remanded, for further proceedings in conformity to this opinion.

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CASE 50—ACTION OF COVENANT—APRIL 25.

Wood, Etc. v. Friendship Lodge, Etc.

APPEAL FROM FAYETTE CIRCUIT COURT.

1. **ESTOPPEL**—To DENY CORPORATE EXISTENCE.—A person who executes a covenant to a corporation can not deny generally the existence of such corporation in bar of the action. Such a pleading, if good at all, is in abatement and not in bar.
2. **SURETIES**—LIABILITY WHERE PRINCIPAL SUCCEEDS HIMSELF.—Sureties of a treasurer who succeeds himself are liable for a deficit occurring during the term for which they were sureties in the absence of a showing that the treasurer actually turned over to himself as his successor the apparent balance in his hands.

WEBB & FARRELL AND BRONSTON & ALLEN FOR THE APPELLANTS.

1. The liability of the appellants upon Tate's bond was only for the acts of treasurer Tate during the period of one year from the date of his election. Brandt on Suretyship, vol. 1, sec. 168; Bigelow v. Bridge, 8 Mass., 275; Com. v. Smith, 14 Ky. Law Rep., 573; Offutt v. Com., 10 Bush, 214; Cook v. Clark, 13 Ky. Law Rep., 101.

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Wood, &c., v. Friendship Lodge, &c.

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2. The evidence shows that at the expiration of Tate's first year as treasurer he had in his hands the sum of \$119.68 which he turned over to himself as his successor.
3. The entry upon the books shows that the sum of \$119.68 was on hand July 1st, 1895, and this was competent evidence as held by this court in the case of *Commonwealth v. Tate*, 89 Ky., 605. See further *Alvord v. U. S.*, 1 Fed. Cases, 535; *U. S. v. Earhart*, 25 Fed. Cases, 970; *Kingsberry v. Westfalls*, 65 N. Y., —.

## HOBBS &amp; SCOTT FOR THE APPELLEE.

Upon the issue whether Tate paid over to himself as successor the balance in his hands, the burden was upon the sureties and this burden they failed to sustain.

## Z. GIBBONS ON THE SAME SIDE.

Counsel argued that the evidence failed to show that the balance in the hands of Tate was turned over to himself as his own successor at the expiration of the period for which the appellants were sureties in his bond as treasurer.

## JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

Friendship Lodge, No. 5, I. O. O. F., of Lexington, Ky., instituted this action against P. A. Tate and the appellants, L. Royalty, and B. D. Wood, seeking to recover judgment against the defendants for a certain sum of money alleged to be due from Tate, as former treasurer of the appellee. The following is the commencement of the petition: "The plaintiff, Friendship Lodge, No. 5, I. O. O. F., of Lexington, Ky., a corporation created by, and under the laws of Kentucky, by its attorneys comes and states that on or about the 6th day of July, 1894, the defendant P. A. Tate was elected treasurer of the widows' and orphans' fund of said lodge, and accepted the office, and was about to enter upon the discharge of the duties thereof, when said defendants P. A. Tate, L. Royalty, and B. D. Wood, all members of the order of Odd Fellows, in consideration that said Tate should be allowed to act as said treasurer, executed and delivered to plaintiff their bond in writing, sub-

scribed by them. . . ." The terms of the bond are then set out, as well as the breach, and judgment for \$185.18 prayed for. The bond is copied as part of the petition, and bears date the 6th day of July, 1894, and signed by the aforesaid defendants.

The motion of the defendants Wood and Royalty, to require plaintiff to make its petition more definite and certain, was overruled, and we think properly. Afterwards appellants, Wood and Royalty, filed their answer. The first paragraph of said answer denied that the plaintiff was a corporation, and denied that said Tate received money belonging to the fund mentioned in the petition during his continuance in office, amounting to \$464.90, or other sum, except as hereinafter set out, and denied that he failed to pay over to his successor or to the plaintiff the sum of \$185.18, or any other sum, received as treasurer of said fund. The second paragraph pleads that the plaintiff is an association organized for the mutual benefit of its members, having a constitution and certain rules under which it acts; and it is substantially alleged that section 52 of the by-laws requires the appointment of a committee on widows and orphans of three persons, who shall be annually elected, and whose duty it shall be to receive semi-annually from the treasurer such money as may have accrued during the term, and invest the same in accordance with the directions of the lodge; and that the plaintiff did on the 29th of June, 1884, elect a committee, consisting of Tate, etc.; and that upon the 6th of July, 1894, these defendants together with said Tate, did execute the bond filed with the petition, and Tate did proceed to act as treasurer, under the provisions of said section; that said Tate, as treasurer, and said committee, were elected for a period of one year from said date, and on the 28th of June, 1895,



plaintiff, in accordance with said section, elected another committee, consisting of Tate, Masner, and Hering, and that the said last committee selected the defendant Tate as treasurer, and from June 29, 1894, to June 28, 1895, the said Tate collected and received the sum of \$324.90, of which he paid out on proper orders \$205.22, leaving a balance of \$119.68 in his hands on the said 28th day of June, 1895, when the new committee was elected, and when on said date he was selected as his own successor he turned over to himself, as his own successor, the said sum, and continued to hold same as such; and they plead that the bond executed by them was only for his conduct from June 29, 1894, to June 28, 1895. The third paragraph attempts to plead that the committee shall give such security for the faithful performance of their trust as the lodge may require, and, under the provisions of section 57, it is required of the committee, mentioned in section 52, to give security for the faithful performance of their duty, and that there was no provision of the by-laws of plaintiff releasing said committee from liability on said bond, and by reason of these facts the bond mentioned in the petition is also void.

Plaintiff's demurrer to the entire answer was sustained, with leave to amend. The amended answer specifically sets out the election of Tate as before indicated, and charges that he turned over to himself, as his successor in office, \$119.68, which he held at the time of his election, in 1895.

A demurrer to the answer as amended was overruled. The reply of plaintiff is a specific traverse of all the averments that Tate turned over any part of the \$119.68 to himself as his own successor. The second paragraph of the reply denies that Tate was elected for one year only,

but avers that he was elected for one year, and until his successor should be duly elected and enter upon the discharge of his duties, and that he remained such treasurer until he received the full amount of \$469.90; and plaintiff denied that said Tate only received the sum of \$329.90, but, on the contrary, he collected \$469.90, as stated in the petition. It is denied that on the 28th of June, 1895, Tate had any money belonging to the lodge in his hands; and denies that said Tate turned over to his successor, or to himself as his own successor, \$119.68, or any part of the sum; and denied that he complied with the terms of his bond in every respect, etc.

The rejoinder is a denial of the allegation that Tate was elected treasurer for one year, and until his successor should be elected and enter upon the discharge of his duties, and denies that said Tate remained treasurer until he received \$469.90, or any other sum, except as set out in the answer.

At the close of the plaintiff's testimony appellants moved for a peremptory instruction to the jury to find for the appellants, which was overruled, with exceptions. Tate made no defense. At the close of all the testimony, the court, upon motion of plaintiff, instructed the jury to find for appellee \$119.68, which was accordingly done, and judgment rendered therefor; and, appellants' motion for a new trial having been overruled, they prosecute this appeal.

The grounds relied on for a new trial are, in substance: First, because the verdict is not sustained by sufficient evidence and is contrary to law; second, for error of law occurring at the trial and excepted to by the defendants; third, that the court peremptorily instructed the jury to find for the plaintiff, to which instruction defendants objected and excepted at the time.

It is suggested for appellants that the averment in the petition that plaintiff was a corporation being denied by defendants, and no proof introduced in support thereof, the court should have given the peremptory instruction asked for by the appellants.

It is provided in section 566, Kentucky Statutes, that no corporation organized under chapter 32 of Kentucky Statutes shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it; nor shall any person transacting business with such corporation, or sued for injury done to its property, be permitted to rely upon such want of legal organization as a defense.

If, however, the statute *supra* does not preclude the appellants from denying the plaintiff was a corporation, we think the pleading in that respect was insufficient; or, in other words, that it was a plea in abatement, and not available as a plea in bar.

This court, in the case of Woodson, etc., v. The Bank of Gallipolis, 4 B. Mon., 203, in discussing similar questions, said: "It may be further observed that the matter of the plea, that there was no such corporation in existence, being essentially a matter in abatement, and not in bar, and having been pleaded in bar, could not, in strictness, operate either in bar or abatement."

In Jones v. Bank of Tennessee, 8 B. Mon., 123 [46 Am. Dec., 540], the court, in discussing the same question, in substance, said: By executing a note payable to the corporation, the defendants are estopped to deny its existence at that time. If its existence had terminated before the commencement of the suit, the plea should have averred the facts which produced its termination, to have enabled the court to determine whether or not it had this

effect. . . . Besides, the plea that no such corporation is in existence is substantially a matter of abatement, and can not be relied on in bar of the action.

In *Lail v. Mt. Sterling Coal Road Co.*, 13 Bush, 34, the court, in considering this same question, said, in substance: The appellant has admitted, by his own undertaking, the existence of the corporation and its organization; and if the corporation has ceased to exist, or the company was never incorporated, the defense, to make it available, must be made by an appropriate pleading. A note executed to one as administrator disposes of the necessity of producing letters of administration, or a note payable to the Bank of Kentucky is an admission by the obligee that said bank exists. . . . The court, in further considering the petition, in the case *supra*, said, in substance: "The petition is not only good on demurrer, but a general traverse, by plea, that no such corporation existed, would be bad on demurrer, as such a plea is a denial of a fact that the obligee has already admitted."

It seems clear to us that the denial that plaintiff was a corporation could not, in this case, operate to defeat the cause of action.

It is, however, insisted with ability, and by citation of numerous authorities, which it is contended sustain appellants' contention, that the evidence shows that the appellants were not bound for the \$119.68, the amount of the judgment, and which sum it is evident that Tate had either used or had on hand at the time of his second selection as treasurer. It may be conceded that, if Tate had the \$119.68 in his hands at the time of his second election and qualification, it was his duty to turn same over to himself as treasurer; but it seems to us that there is no evidence tending to establish that he did so, nor do we think that

Galbraith v. Williams, J. P.

the evidence introduced tends to show that he in fact at that time had that amount on hand and, it is certain that, if he had already squandered that sum, the appellants would be bound therefor. It is not contended that Tate ever did turn over to the plaintiff, or any person, unless it was himself, entitled, to receive the money, any part of the \$119.68; and it seems to us that the burden to establish the defense was upon the appellants, and, as they totally failed to introduce proof conducing to sustain the defense, it follows that the peremptory instruction given by the court below was proper, and the judgment appealed from is affirmed.

CASE 51—MANDAMUS—APRIL 26.

Galbraith v. Williams, J. P.

APPEAL FROM MASON CIRCUIT COURT.

**AFFIDAVIT TO REMOVE JUSTICE OF PEACE—MANDAMUS TO CONTROL DISCRETION.**—An affidavit that a justice of the peace will not afford a litigant a fair and impartial trial without stating the facts upon which such an opinion is based is insufficient; and the ruling of the justice that such affidavit was insufficient being within discretion will not be controlled by mandamus.

L. W. GALBRAITH FOR APPELLANT.

1. Upon oath by a litigant that he believes that he can not have a fair trial in a justice's court, his right to a change of venue is absolute. This is not analogous to an affidavit to disqualify a circuit judge. Ky. Stats., secs. 1107, 968; *German Ins. Co. v. Landram*, 88 Ky., 433.
2. Mandamus lies to enforce ministerial act. Civil Code, sec. 477; *Cassidy, Auditor's Agt., v. Young*, County Judge, 92 Ky., 227; *Howes v. Walker*, 92 Ky., 258.
3. It lies to compel inferior court to act and controls it as to strictly ministerial acts. *Cassidy, &c., v. Young, &c.*, *supra*; *Com. v. Boone County*, 82 Ky., 632.

106	431
110	484
106	431
138	245

## Galbraith v. Williams, J. P.

4. Mandamus will lie to compel a justice of the peace to allow change of venue where statute has been complied with and the right is absolute. State, *ex rel*, Uedeking, v. McCracken, 1 Mo. App., 223.
5. Mandamus is the established remedy to oblige inferior courts to do justice, especially when the case is outside of discretion. 3 Bl. Com., 110; Virginia v. Rives, 100 U. S., 323.

(No appearance for appellee.)

## JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The appellee, Williams, is a justice of the peace in Mason county. There was pending before him a suit of Jack Anderson against the appellant, Galbraith. The appellant filed therein the following affidavit, to-wit: "The defendant, August Galbraith, states that he believes that he can not have a fair trial in the court of C. W. Williams, J. P. M. C., in which this cause is pending, and prays for a change of venue to the court of some other justice of the peace of Mason county." Upon the consideration of the motion, the appellee overruled it, and proceeded to try the case. These facts appear in the petition, to which the court sustained a demurrer.

The purpose of this action was to have the circuit court issue a mandamus against the appellee, compelling him to sustain the motion, and grant a change of venue. The affidavit was filed under section 1107, Kentucky Statutes, which reads as follows: "A party to a suit pending before a justice or police or city judge, shall have a change of venue to another justice of the same county when he shall make oath that he believes he can not have a fair trial in the court in which the cause is pending, and the cause may be tried out of term time by the justice to whose court it is removed." As the affidavit failed to state the fact or facts upon which the belief is founded that he could not have a fair trial before the appellee, it was insufficient, and the court properly overruled the motion.

Section 968, Kentucky Statutes, provides, "If either party shall file with the clerk of the court his affidavit that the judge will not afford him a fair and impartial trial," a special judge shall be selected or elected to try the cause.

This court held, in interpreting that section of the statute in *German Insurance Co. v. Landram*, 88 Ky., 433 [11 S. W., 367, 592], that the affidavit must state the fact or facts upon which the belief is founded that the judge will not give a fair trial.

In the case of a circuit judge, he would vacate the bench, and a special judge would take his place; in a proceeding before a magistrate, instead of vacating the bench, he would simply send the case to another justice of the peace for trial. Whilst the course to be pursued in the one case differs from the other, still the effect is precisely the same, to-wit, to prevent the regular judge or justice from hearing and deciding the case.

We think the Legislature has recognized the correctness of the interpretation which this court, in *German Insurance Co. v. Landram*, gave the statute, by re-enacting it.

We are of the opinion that the affidavit was insufficient to require the appellee to transfer the case to another justice of the peace for trial. The act which the judge was called upon to perform was not a ministerial act, but a judicial one. There is no allegation that he refused to act, but the complaint is that he did act, and adjudged the affidavit was insufficient by overruling the motion. In a case where an officer is required to exercise judgment or discretion, a mandamus will lie to compel him to act, but not to control his judgment. *Cassidy v. Young*, 92 Ky., 227, [17 S. W., 485]. The appellee did not refuse to act, but, on the contrary, did act, and the mandamus

will not lie to revise his action, and compel him to act different from the manner in which he did act. The judgment is affirmed.

CASE 52—ACTION FOR FRANCHISE TAX—APRIL 26.

City of Newport, Etc. v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. AMENDING PETITION TO INCLUDE A NEW DEFENDANT.—The city of Newport having made a report for franchise tax in the name of the Newport Waterworks, an action against the Newport Waterworks was properly amended to make the city of Newport a substitute defendant.
2. CONSTITUTIONAL LAW—VESTED RIGHTS—NO COMPLAINT FROM PARTIES NOT AFFECTED.—A municipality will not be heard to complain of the invalidity of an act taxing its waterworks franchise on the ground that it divests vested rights of the holders of city bonds.
3. MUNICIPALITIES—LIABILITY FOR FRANCHISE TAX ON WATERWORKS.—A municipality owning waterworks and selling water generally to the public may, under the statutes, be required to pay a franchise tax.
4. TAXATION OF TANGIBLE PROPERTY.—On the tangible property constituting the waterworks plant the municipality is liable for taxation as a private corporation would be.
5. EXEMPTION ACT—REPEAL OF.—The act of March 8, 1878, exempting the Newport Waterworks from taxation as long as it should be unproductive was repealed by the adoption of the Constitution.
6. *Res Adjudicata*.—An adjudication upon a liability for taxes for one year is no bar to an action for taxes for a subsequent year, it not appearing that the adjudication resulted from a contract exempting the defendant.

HORACE W. ROOT FOR THE APPELLANT.

1. A litigant has no right by an amended pleading to substitute a new defendant for original defendant. Sub-division 1, art. 2, ch. 108, Ky. Stats.; *Houston v. Kidwell*, 12 Ky. Law Rep., 387;

106	434
111	952
106	434
127	784
106	434
1128	41



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City of Newport, &c., v. Commonwealth.

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Bridgeport v. Miller, &c., 13 Ky. Law Rep., 927; Newman's Pleading & Practice, p. 238; Bliss on Code Pleading, sec. 429; Hart v. Bowie, 34 La. An., 323; 1 Am. & Eng. Ency. of Law, 546.

2. Is a municipal corporation subject to a franchise tax? Act of January 26, 1871, "An act to authorize the city of Newport to supply itself and others with pure water and to establish a waterworks." Ky. Stats., secs. 3143, 3058, sub-div. 4; Municipal Corporation, Dillon (4th ed.), vol. 1, sec. 27.
3. A general statute does not apply to or embrace a municipal corporation unless in express terms. 23 Am. & Eng. Ency. of Law, 365, paragraph E.
4. The principle or method of assessment and valuation of a corporation by capitalizing its net income upon a 6 per cent. basis is erroneous. Ky. Stats., sec. 4078; Henderson Bridge Co. v. Com., 17 Ky. Law Rep., 389.

**W. S. TAYLOR, ATTORNEY-GENERAL, FOR THE APPELLER.**

1. It was proper to permit plaintiff to file an amended petition making the city of Newport a party. Civil Code, sec. 134; Heckman's Admr. v. L. & N. R. R. Co., 85 Ky., 631; L. & N. R. R. Co. v. Hill, 12 Bush, 131.
2. The right of the State to recover taxes on waterworks property owned by a city is too well settled to require discussion. City of Covington v. Com., 19 Ky. Law Rep., 105; Com. v. Makibben, 90 Ky., 384; Com. v. City of Louisville, 20 Ky. Law Rep., 893.

**HORACE W. ROOT FOR APPELLANT IN A PETITION FOR A REHEARING.**

Counsel cited in addition to the citations of his original brief: City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S., 371.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

The secretary of the Newport Waterworks made a verified statement as required by section 4078, Kentucky Statutes, in order for the Board of Valuation and Assessment to determine the value of its franchise for taxation for the year 1894, upon which statement that board proceeded to value and assess the corporate franchise of the Newport Waterworks. Suit was brought in the Franklin Circuit Court for the taxes of that year, alleging that the New-

port Waterworks was a corporation, having and exercising privileges and franchises not allowed by law to natural persons. Summons having been served upon the president and chief officer of the board of waterworks trustees, there were filed a demurrer, a special demurrer for want of jurisdiction of the defendant, the Newport Waterworks, and an answer, in which the Newport Waterworks alleged that there did not and never had existed a corporation of that name, and denied that it was a corporation, or was organized or doing business as such. A few days after the filing of these pleadings, and before they were acted upon, the Commonwealth amended its petition, making the city of Newport a party defendant, alleging that it was a municipal corporation, a city of the second class; that it owned and operated the Newport Waterworks; that, by the terms of its charter, it was authorized to, and did, own and operate the waterworks, and charge tariff rates for water, as other companies; that the waterworks were not used by the city for governmental purposes, but as a private enterprise, the accounts thereof being kept distinct and independent of the governmental affairs of the city, all citizens who used the water being charged the regular tariff rate; that the city, so far as the waterworks and waterworks property were concerned, was engaged in the business of an ordinary water company, operating the works for profit; that, while not a corporation, the Newport Waterworks was used and operated as a water company, and had a secretary, duly elected by the city of Newport, the owner of the property, and duly selected as such secretary by the commissioners of the waterworks, who had theretofore been selected as such commissioners by the city, as provided in its charter; and that by said secretary the report to the Board of Valuation and Assessment was made.

Subsequently, the city entered its objection to the filing of the amended petition, and moved to set aside the filing, on the ground that neither at the time of the institution of the action, nor before, nor since was there any such defendant or corporation as the Newport Waterworks, and, therefore, there was no action commenced, or in being, to which the amendment could be made. This objection, and the demurrer to the petition, were overruled, and a judgment rendered, which was afterwards, by agreement, set aside, and an answer filed by the city of Newport pleading to the merits. An agreed statement of facts was filed, the case submitted, and judgment rendered against the city for the tax.

It is first urged that it was error to permit the amended petition to be filed, making the city of Newport a party defendant, upon the ground that there was no action pending against any natural or artificial person, and, therefore, nothing to be amended; that an amendment presupposes a real action or proceeding already pending in court; that, in this case, there was nothing to which an amendment could go, because there was no petition stating, or attempting to state, a cause of action against any real person, natural or artificial; and that the original petition was a nullity. It is further urged that this case is not one of misnomer, or of a suit against a real person by a wrong name, or against one person erroneously sued under the name of another, in which cases it seems to be conceded that an amendment might be made under the authority of section 134 of the Civil Code, and the cases of *Heckman's Adm'r v. L. & N. Railroad Co.*, 85 Ky., 631 [4 S. W., 342], and *L. & N. Railroad Co. v. Hall*, 12 Bush, 131.

Upon the other hand, it is urged on behalf of the Commonwealth that as the city, by its own officers, caused the

report for franchise tax to be made in the name of the Newport Waterworks, and the waterworks were distinct in management from the city government, being controlled by commissioners selected by the city, and by whom water rates were fixed, the waterworks were, in effect, a *quasi* corporation, or a company or association, within the meaning of sections 4077, 4078, Kentucky Statutes.

But, without going into that question, it seems to us that the amendment and the original petition may be considered together as an original petition against the city of Newport, to which the city entered its appearance without reservation.

Nor does the case of *Houston v. Kidwell*, 83 Ky., 301, 12 Ky. L. R., 387 [14 S. W., 377], cited by counsel for appellant, seem to us to be in conflict with this view. That was an action for a new trial. The petition was erroneously dismissed. Afterwards, an amended petition was filed alleging the discovery of additional evidence, but which was merely cumulative. The judgment dismissing the original petition was not appealed from, and it was held that the amended petition could not be treated as a petition, for the reason that the relief sought was *res adjudicata* by the final judgment on the first petition, from which no appeal had been taken.

Nor does the citation from Newman's Pleading and Practice, page 288, apply. That refers to a case where the wrong person brings an action for a liability existing, but existing in favor of another person than the plaintiff. And, while it is there said that "the foregoing rules apply, for the most part, equally to a mistake in the name of the defendant as of the plaintiff," that does not apply to a case like this, where the original petition is good upon its face, but a mistake has been made in the name of the party upon

whom the liability rests, as the owner of specific, described property. In such case, there would seem to be little difference whether the owner was sued originally by the name of another existing person (as in the Heckman's Adm'r and Hall cases, *supra*), or was sued by the name of a non-existent person.

The question whether the city might have taken advantage of the mistake by special entry of its appearance and dilatory pleading is not here presented, as it appeared without reservation.

The answer presents several defenses:

First. That the city was authorized, by act of the Legislature, to build and operate a waterworks system, and has built such system, and operates it through a board styled the "Commissioners of Waterworks," having issued \$800,000 of bonds, \$708,000 of which are still outstanding; that it exercises no right or privilege with respect to its waterworks which a natural person might not do; that its waterworks are situated within its corporate limits, or upon its own land outside the limits; that the report made by the secretary of that board was erroneous; that, including the interest upon the bonded debt created to build and operate the waterworks, the expense of operation was more than \$35,000 in excess of the actual receipts; that the waterworks department of the city is not a paying institution, and its actual receipts in any year since the act authorizing it to be built have not been sufficient to meet both its operating expenses and the interest upon the bonds issued to build it, but that the city, by the annual levy and collection of a tax, meets and pays off the interest and bonds of the waterworks falling due in each year; that it will not be self-sustaining for many years to come; and that its tangible property used in connection with the waterworks sys-

tem was, in the year 1894 and subsequent years, assessed by the State for taxation, and taxes thereon paid.

Second. That the city exercises no special or exclusive privileges or franchises not allowed by law to natural persons, with respect to its waterworks; that the works are used for governmental purposes, and not as a private enterprise; that the accounts of the waterworks are not kept distinct and independent of the governmental affairs of the city; that it is not engaged in the business of an ordinary water company, and that the waterworks are not a private enterprise, operated for profit.

Third. That, by an act adopted March 8, 1878, it was provided that the waterworks should be exempt from county and State taxation so long as it should be unproductive; and that it has been unproductive since its establishment.

Fourth. That the imposition of a franchise tax is in violation of the State Constitution, and also in violation of subsection 1, section 10, article 1 of the Federal Constitution, prohibiting the passage of a law impairing the obligation of contracts, for the reason that, at the time of the issuance of the bonds, there was no franchise tax authorized to be collected from the city on account of the waterworks system, and the bondholders have a vested right to the bonds free from such a tax.

Fifth. That the liability of the city to a franchise tax is *res adjudicata*, by a judgment rendered in a suit by the Commonwealth against the Newport Waterworks and the city of Newport for a franchise tax, on account of the city's ownership and operation of the waterworks, for the year 1893, under the same law under which the present action was instituted; the subject-matter of that suit being identical with the subject-matter of the case at bar, except that in that action the suit was to collect the tax for the year 1893, and the present suit is for the year 1894.

As to the fourth ground, it is sufficient to say that the bondholders were not parties to this proceeding, and that, so far as we are informed, it has never been held that the fact that no tax was levied upon the property at the time of its acquisition had the effect to prevent the imposition of a tax thereon in subsequent years.

The claim of exemption under the act of 1878 can not be sustained, as it is not claimed that any contract right existed thereunder, and the exemption thereby given is repealed by the present Constitution.

The first and second defenses present the question, in substance, whether a municipal corporation can be subject to a franchise tax. It seems, under the case of *City of Owensboro v. Commonwealth* (Ky.), [49 S. W., 320], that the waterworks might be exempt from taxation as public property used for public purposes, under section 170 of the Constitution, if operated solely for the purpose of extinguishing fires, cleaning the streets, and the like, which, under the opinion in that case, would be deemed governmental purposes; and that, if the tangible property held and used for that purpose would not be taxable, neither would the city be taxable on a franchise to so operate and use it. Is the case altered by the fact that the city, while operating the waterworks for the convenience of its people, makes a charge against them for furnishing them with water?

In the case of *Commonwealth v. Makibben*, County Judge, 90 Ky., 384 [14 S. W., 372], it was held by this court that the power granted to the city of Newport to operate its waterworks was not granted as necessary to carrying on its municipal government as a political power, but merely as a private corporation for the convenience or profit of its citizens, and, therefore, not only taxable by the

Commonwealth, but not to be constitutionally exempted from taxation. Said the court, through Judge Bennett: "But may a city be treated as a private corporation in the exercise of powers not necessary to carrying on its municipal government as a political power? We have heretofore said that it may be so treated. We have also said that its property necessary to carrying on its municipal government as a political power is not subject to State taxation. But, if it is not necessary for such purpose, then it must be treated as the property of a private corporation, and is subject to State taxation, unless it is expressly exempted in consideration of public services," (referring to *City of Louisville v. Com.*, 1 Duv., 298 (85 Am. Dec., 624), and *Barbour v. Board of Trade*, 82 Ky., 649).

In the same opinion, the court quoted, with approval, as follows, from *Bailey v. City of New York*, 3 Hill, 531 (38 Am. Dec., 669), in which case it was decided that the city, in erecting waterworks, acted in its private, not public character: "But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purposes of the Legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, municipal character; but if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quo ad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom a like special privilege had been conferred."

So, in *City of Covington v. Com.*, 19 Ky. Law Rep., 105 [39 S. W., 836], it was held, in an opinion by Chief Justice



Lewis, that the waterworks of the city of Covington could not, under the Constitution, be exempted by special statute from taxation (referring to *Clark v. Louisville Water Co.*, 90 Ky., 515 [14 S. W., 502], in which the same question was decided).

It seems, therefore, to be well settled that the tangible property used for waterworks purposes is subject to taxation; and that the municipality, as to it, occupies the position of, and is to be treated as, a private corporation.

Section 4077, Kentucky Statutes, which requires a franchise tax to be paid by certain enumerated companies, includes water companies in the list of companies required to pay such tax, and also requires such tax to be paid by "every other like company, corporation or association;" and section 4082 Kentucky Statutes provides that "Whenever any person or association of persons not being a corporation nor having capital stock, shall, in this State engage in the business of any of the corporations named in the first section of this article (section 4077), then the capital and property, or the certificates or other evidences of the rights or interests of the holders thereof in the business or capital and property employed therein, shall be deemed and treated as the capital stock of such person or association of persons for the purposes of taxation and all other purposes under this article, in like manner as if such person or association of persons were a corporation."

The three sections (4077, 4078, and 4082), taken together, clearly indicate the intent of the Legislature that no corporation, company, association, person, or aggregation of persons should be permitted to engage in any of the businesses enumerated in section 4077, without thereby being required to make report to the Board of Valuation and Assessment, and becoming subject to the so-called franchise tax.

Under the doctrine laid down in the cases referred to, the municipality occupies, as to its waterworks, the same position as would a private corporation owning such works. It follows, inevitably, therefore, from that doctrine, that not only is the tangible property used by the city for waterworks purposes taxable by the Commonwealth as non-municipal and private property, but that, as to that property, it is subject to a franchise tax, and must make report therefor, as required in section 4078.

The only question remaining for decision is upon the plea of *res judicata*.

The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action, and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893 and the present action was attempting to collect a tax for the year 1894; that said action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition. A copy of the judgment was filed as part of the answer, and it was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive.

The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to pay; and the right to litigate the legality of a tax upon

all grounds must, of necessity, exist, regardless of former adjudications as to the validity of a different tax.

In *Keokuk & W. R. Co. v. Missouri*, 152 U. S., 314 [14 Sup. Ct., 597], the Supreme Court held: "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S., 357. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered.

. . . The same principle was reaffirmed in *Nesbit v. Independent District of Riverside*, 144 U. S., 610 [12 Sup. Ct., 746], and in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S., 279, 302, [12 Sup. Ct., 72]. In the case of *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year; each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as, two promissory notes) forming the subject-matter of successive actions between the same parties, *both growing out of the same transaction*, in which a defense set up in the first suit, and held good will conclude the parties in the second. . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate,

though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties.' It could never be tolerated that the State should be forever barred in the collection of taxes by an erroneous decision." 146 U. S., 314-316, [13 Sup. Ct., 105, 106.]

In *Lake Shore & M. S. Ry. Co. v. People*, 46 Mich., 208, [9 N. W., 249], a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res judicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion:

"The decree in the Wayne circuit would not prevent the State from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance, except as a precedent. In this case, it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich., already referred to; and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound, in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause,

but one arising since then, and the State is not in this case seeking to recover any portion of the taxes the collection of which was restrained in that case."

We do not think the plea of *res adjudicata* avails in this case. As stated in 21 Am. & Eng. Enc. of Law, p. 227, the rule is: "To make a matter *res judicata* there must be a concurrence of the four conditions following, namely: First, identity of the subject-matter; second, identity of cause of action; third, identity of persons and parties; fourth, identity in the quality of the persons for or against whose claim is made." The taxes for the subsequent year constitute a new cause of action; it may be similar to the cause which was adjudicated, but a distinct and different cause. The rulings of the court upon the legal questions involved, if rendered by this court, are authority here, to the extent, and no further, than like decisions would be, in a suit between different parties. In our opinion, it would be against public policy to hold that a judgment of a circuit court upon a question of taxation is forever binding upon this court, not only as to taxes there in litigation, but also as to taxes for all subsequent years, merely because counsel for the Commonwealth failed to bring the question here. Such a ruling would seem to be open to the objection that it would hold the Commonwealth bound by the laches of its officer.

The decision of the circuit court as to the taxes of 1893 is not binding upon this court as to the taxes for subsequent years. It follows, therefore, that the judgment must be affirmed.

The whole court sitting.

JUDGE DURELLE DELIVERED THE FOLLOWING SEPARATE OPINION IN RESPONSE TO PETITION FOR REHEARING:

The original opinion in this case, prepared by direction

of the court, correctly set forth the views of the majority of the court. It did not fully state the views of the minority upon the question of *res judicata*.

When the petition for rehearing was filed, the minority took the position that the opinion should be so extended as to rest the decision upon a doctrine in which all could unite, and not decide, or appear to decide, a question not necessarily raised by the record, and upon which the members of the court are not in harmony. The majority, however, have decided to adhere to the opinion as originally delivered, and the views of the minority upon this question are here presented.

The plea of *res adjudicata* in this case avers that the subject-matter of the former suit was identical with that involved in this action; that the facts were the same in both actions, *except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894*; that the former action was tried upon its merits, and a judgment rendered by the circuit court dismissing the plaintiff's petition, a copy of the judgment being filed as part of the answer. It was further averred that the judgment had never been reversed or modified, and no appeal had ever been taken, but that it had become final and conclusive.

It will be observed that this plea does not show upon what ground the court based the judgment relied upon as *res judicata*, nor does the judgment itself show on what ground it was based. Giving the fullest effect to the pleading, and assuming, as we must, under the averment that the subject-matter of the former suit was identical with the subject-matter of this, that the same defenses were pleaded in that case as in this, and that the court decided that case upon the merits, and dismissed the petition, it

still does not appear whether the petition in that case was dismissed because the court held that there was a contract exemption from taxation in favor of appellant, because it held that a municipality could not be subjected to a franchise tax with respect to its use of any of its property, or because it held valid some one of the other defenses pleaded in this action, and presumably pleaded in that.

It therefore becomes necessary for us to consider whether the doctrine of *res judicata* is applicable to all of the defenses pleaded; for, if inapplicable to one, as that defense may, for all that appears in the answer, have been the one upon which the former case was decided, we must apply the maxim, "*Fortius contra proferentem*," conclude that that was the defense upon which the case was decided, and hold the pleading insufficient.

This brings us to consider the question whether *res adjudicata* as to the validity of a tax for one year can apply in a suit for a tax for another year.

The authorities, in general, are to the effect that when, in a court of competent jurisdiction, upon a proper issue, a contract out of which several distinct promises to pay money arose has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed *in invitum*. The taxpayer does not agree to pay, but is forced to do so; and the question is whether the judgment of a court fastening one such burden upon the citizen estops him to contest the validity of a similar burden thereafter sought to be imposed upon him, and, on the other hand, whether the refusal of the court to impose such a burden estops the government from thereafter asserting a similar right against that citizen. And, in considering this ques-

tion, we shall consider it on the theory that there is no question of contract involved, but that the question arises solely upon the legality of the tax, as in a case where the question is upon the constitutionality of the law, or as to whether the property sought to be taxed is embraced by the law.

In *Keokuk & W. R. Co. v. Missouri*, 152 U. S., 314, [14 Sup. Ct., 597], the Supreme Court held: "A suit for taxes for one year, is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the court upon that question might raise an estoppel in another suit, upon the principle stated in *Cromwell v. Sac County*, 94 U. S., 357. But, as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. . . . The same principle was reaffirmed in *Nesbit v. Independent Dist., of Riverside*, 144 U. S., 610, [12 Sup. Ct., 746], and *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S., 279, 302 [13 Sup. Ct., 72]. In the case of *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, the Supreme Court of Iowa held that a decree in favor of a railway company in a suit for taxes for a prior year would not estop the State from collecting the taxes for a subsequent year, each year's taxes constituting a distinct and separate cause of action. 'The cases,' said the court, 'are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same par-



ties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . Taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision," 152 U. S., 314-316, [14 Sup. Ct., 597].

But in *New Orleans v. Citizens' Bank*, 167 U. S., 396, *et seq.*, [17 Sup. Ct., 905, *et seq.*] in an elaborate opinion the Supreme Court, while admitting that in the *Keokuk* case the opinion, *arguendo*, discussed the question of whether a judgment against the validity of a tax for one year would be a bar to a suit for taxes for a subsequent year, held the expressions of the court used in argument in that case to be *dictum*, and distinctly decided that "the estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies." And, again, on page 398, [17 Sup. Ct. 914]: "It follows, then, that the mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the

prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed."

The language used in the case of *City of Davenport v. Chicago, R. I. & P. R. Co.*, 38 Iowa, 633, has been greatly qualified, if not repudiated, by the same court, in *Goode now v. Litchfield*, 59 Iowa, 226, [9 N. W., 107, and 13 N. W., 86], where the court said: "The question whether the estoppel is effectual will depend upon the issues in the two actions. If the right to recover and the defense thereto are based upon precisely the same ground, why litigate again a question that has been determined? In such case the very right of the matter has been determined by a court of competent jurisdiction."

Upon the other hand, in *Lake Shore & M. S. Ry. Co. v. People*, 46 Mich., 208 [9 N. W., 250], a suit for taxes, there had been a decision adverse to the validity of the taxes for certain previous years, but the court held that the result of a suit for the taxes of particular years is not *res adjudicata* in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents. Said Chief Justice Marston, delivering the opinion: "The decree in the Wayne Circuit would not prevent the State from claiming and seeking to recover taxes accruing subsequent to the years or taxes then passed upon. This is a new controversy, for a new cause of action, and in which some of the legal questions then passed upon are again raised, and the decision of the court thereon is of no importance except as precedent. In this case it is not conclusive. Such was the view of Mr. Justice Campbell upon a similar question in the case in 9 Mich. [*Railroad Co. v.*

Auditor General, 9 Mich., 448], already referred to, and, as that case is reported, there does not seem to have been any diversity of opinion on this point. The parties are bound in so far as regards the subject-matter then involved, but are at liberty to raise anew the same legal questions in a case arising subsequently, even although the facts may be substantially alike in other respects. The principle is that a party shall not be twice vexed for the same cause; but this is not the same cause, but one arising since then, and the State is not, in this case, seeking to recover any portion of the taxes the collection of which was restrained in that case."

In *State v. Bank of Commerce*, 95 Tenn., 222 [31 S. W., 993], it was held that a judgment adverse to a claim for taxes for one year constituted no bar to a suit for taxes of a subsequent year; and in the recent case of *Union & Planters' Bank v. City of Memphis*, [46 S. W., 557] (decided April 2, 1898), the same court, through Judge McAlister, said: "Again, we think the plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. *Since this is not a federal question*, we decline to follow the ruling in *City of New Orleans v. Citizens' Bank*, 167 U. S., 371, [17 Sup. Ct., 905], in which it was held, by a majority opinion, that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved. In *State v. Bank of Commerce*, 95 Tenn., 231 [31 S. W., 996], we said: 'These suits being for other years than those sued for in the *Farrington* case [*Farrington v. Tennessee*, 95 U. S., 686], that decision is not, as an adjudication, conclusive of the present case.'"

We do not think the plea of *res judicata* avails in this case. The power to tax is a high governmental power, exercised against the will of the person taxed, and, in our opinion a decision as to one cause of action arising under a tax statute is no more binding upon the government or the citizen than the construction of a penal statute would be in a second prosecution against the same person for an offense exactly similar. The former adjudication would, in such case, have weight as a precedent, but would not bind the parties by way of estoppel. The rulings of the court upon the legal questions involved are authority here to the extent, and no further, that like decisions would be in a suit between different parties. As matter of public policy, and upon grounds of public necessity, we think the principle of *res adjudicata* ought not to be applied to questions of taxation, where the State is exercising its sovereign power.

We concur, therefore, in the conclusion reached by the majority, that this court can not follow the doctrine held by the Supreme Court in *New Orleans v. Citizens' Bank* to its full extent.

But whether the State is bound by a former adjudication that there exists a contract exemption from taxation, or as to the construction of such contract, is a question not necessarily here involved, and to the decision of which it may be that different principles apply. There would seem to be an essential difference between the Commonwealth exercising the highest of its sovereign powers, a power necessary to its very existence, and the same Commonwealth, its sovereignty laid aside, binding itself as a mere corporate entity by a sealed instrument. But it is not, in our judgment, necessary to go into this question, nor even to decide that there is a differ-

## Yellow Poplar Lumber Co. v. Rule.

ence. We think the opinion should be extended upon the lines here indicated.

CHIEF JUSTICE HAZELRIGG AND JUDGE BURNAM CONCUR IN  
THIS SEPARATE OPINION.

CASE 53—ACTION FOR DAMAGES FOR BREACH OF CONTRACT  
—APRIL 26.

## Yellow Poplar Lumber Co. v. Rule.

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1130	530
136	416

## APPEAL FROM BOYD CIRCUIT COURT.

1. **CONTRACT—MUTUALITY.**—A contract to employ plaintiff so long as defendant was engaged in the saw-mill business on the Ohio river for a fixed sum *per diem* in consideration of plaintiff's release of damages incurred in defendant's employment is not void for want of mutuality.
2. **SAME—INDEFINITE TIME.**—Nor is such a contract subject to termination at the will of the defendant for indefiniteness.
3. **SAME—STATUTE OF FRAUDS.**—Such a contract being possible of performance within a year is not within the statute of frauds.
4. **PLEADING—DEPARTURE.**—A demurrer to the amended answer attempting to set up a written release of the damages incurred in defendant's employment in consideration of \$208, and that in consequence of said release the contract sued on was without consideration was properly sustained. The amendment did not meet the issues tendered by the petition.

## HAGER &amp; STEWART FOR THE APPELLANT.

1. The contract sued on was not enforceable for lack of mutuality. *L. & N. R. R. Co. v. Offutt*, 18 Ky. Law Rep., 303; *Bishop on Contracts*, par. 78, 318.
2. Assuming that a valid and binding contract was entered into, the relation of master and servant according to plaintiff's allegation and proof was to continue as long as this mill should operate on the Ohio river. Assuming that the statute of frauds

## Yellow Poplar Lumber Co. v. Rule.

does not apply, that is a hiring for an indefinite length of time and as such was terminable at the will of either of the parties to the contract. *L. & N. R. R. Co. v. Harvey*, 17 Ky. Law Rep., 1368; *L. & N. R. R. Co. v. Offutt*, *supra*; *Wood on Master and Servant*, par. 133, 136; *Perry v. Wheeler*, 12 Bush, 541; *Parsons v. Transon*, 66 Am. Dec., 502; *E. Line, &c., R. R. Co. v. Scott*, 13 Am. St. Rep., 738.

3. If the plaintiff had an option to elect as to the duration of services, he failed to exercise it.
4. If the plaintiff is entitled to anything at all, it is nominal damages only. *Bolles v. Sachs*, 37 Minne., 315.
5. The contract was within the statute of frauds.
6. The court erred in sustaining a demurrer to the amended answer.
7. If the release therein plead was actually executed, then the contract sued on was without consideration.

## DINKLE &amp; MONTAGUE FOR THE APPELLEE.

1. The points of want of mutuality and indefiniteness are not well taken. The cases of *L. & N. R. R. Co. v. Offutt*, 18 Ky. Law Rep., 304, and *L. & N. R. R. Co. v. Harvy*, are not in point, because in those cases there was no consideration for the contract.
2. As to the statute of frauds, this contract does not come within the statute of frauds as it might have been performed within a year from the making thereof. 83 Ky., 544; 7 Ky. Law Rep., 549; 9 Ky. Law Rep., 358.
3. A demurrer to the amended answer was properly sustained because appellant was suing upon a contract and not for the negligent injury to his hand; hence the signed release had no place in this case. If it had been a compromise for the breach of contract then it would have been proper to plead it as a defense to this action for a breach of contract.

## CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Appellee Rule, was an employee in one of the sawmills of appellant company, and, upon having his thumb cut off, as he claims, by the negligence of the company's agents, demanded damages for the injury. He was met with a proposal on the part of the company that if he would forego his suit for damages, and surrender all claim therefor,

it would give him employment at the rate of \$2.50 per day so long as it was engaged in the sawmill business on the Ohio river. He accepted this offer, but afterwards, when was able to work, and when the mills of the company had resumed operation, he was refused employment. It was then too late, under the statute of limitation, to bring suit for damages for the original injury, and this action was then brought for breach of contract of employment. The contract was denied by the company, but is fully made out by the proof. The verdict of the jury was for the sum of \$1,400, and the company has appealed, insisting, first, that the contract as alleged and proved was not a legal and binding one, because of a lack of mutuality. On this behalf it is said, if the appellee's contention is supported, the company was bound to hire, but the employe was not bound to serve. He could work or not work, as he chose, it not being contended that he obligated himself to serve at \$2.50 per day, or any other sum, as long as the mills were operated on the Ohio river.

In our opinion, whilst these are the characteristics of the contract, it does not follow that the employe is without remedy. Except for the fact that courts do not, as a rule, so enforce these contracts of hiring, by reason of their personal nature, the agreement as alleged might be the basis of an action for specific performance, and, such an action not being maintainable by reason of the rule adverted to, we perceive no reason why the appellee might not purchase for a valuable consideration the right to obtain employment or option to work at appellant's mills so long as they engaged in running them at the place designated. Such a contract does not differ in substance from those known as optional contracts in the purchase of prop-

erty, and which have often been upheld by this court where there is a consideration for them, even when there is only an agreement to sell, and no corresponding agreement to buy. *Bacon v. Kentucky Central Railway Co.*, 95 Ky., 373 [25 S. W., 747], and cases there cited.

In *Beach*, on the Modern Law of Contracts, section 457, it is said: "When an employe, in consideration of an agreement on the part of the employer to give him work as long as he is able to perform it, releases a claim for damages said to have been caused by the employer's negligence, the agreement is not void because lacking mutuality. By releasing his claim, the employe has paid in advance for an optional contract, and he has the right to have it remain optional." The author cites the case of *Smith v. St. Paul Railroad Co.* (Minn., 1895) [62 N. W., 392], and which fully supports the text. See also, *Pennsylvania Co. v. Dolan*, 6 Ind. App., 109, [32 N. E., 802].

In the second place, it is insisted that the alleged employment was for an indefinite length of time, and, therefore, subject to termination at the will of either party to the contract. This is, undoubtedly, the general rule, unless, from the terms of the contract, or from some controlling circumstance showing a different intent, the contracting parties must be supposed to have understood that the employment might be terminated at the will of either party. There is nothing in such contracts to the contrary, and the intention of the parties controls. But when, from the contract itself, a different intention is manifested, and the hiring, although not in terms for a definite period in days or months, is for a period of time which is susceptible of at least approximate determination by proof, there is no reason why the rule should apply.



In such case the employment is not for an indefinite length of time, but within the meaning of the parties is for a definite time. In the case at bar the employment was for such time as the company—an Illinois corporation, engaged, doubtless temporarily, in operating its sawmills in Boyd county—should be engaged with its mills in that vicinity. This was not a mere general hiring, or a hiring for an indefinite time as were the cases of *L. & N. Railroad Co. v. Offutt*, 18 Ky. Law Rep., 304; [36 S. W., 181]; *L. & N. R. R. Co. v. Harvey*, 17 Ky. Law Rep., 1368; [34 S. W., 1069]; *East Line Railway Co. v. Scott*, 72 Texas, 70; 13 Am. St. R., 753 [10 S. W., 99]; and *Texas Midland Railroad Co. v. Sullivan* (Tex. Civ. App.), [48 S. W., 598]—cases relied on by appellant.

It is further insisted by appellant that the contract as allowed is within our statute of frauds. It is not contended that this is so merely because the contract is for an indefinite length of time. It is conceded that such a contract is not within the statute, because it may be terminated within a year. But the contention is that it was incumbent on the appellee to make his contract definite as to time when he offered to accept the employment, and, if he elected to fix a time longer than for a year's service, he could not enforce it, and, in any event, his damages must be limited to his alleged loss for one year only. We do not so understand the principles controlling the case. The time of the employment was not left uncertain and indefinite, but it was fixed and definite, and the contract was capable of being fully performed within a year. *Dickey v. Dickinson*, 20 Ky. Law Rep., 1559; [49 S. W., 761].

A demurrer to the amended answer, attempting to set up a written release executed by the plaintiff in consideration of the sum of \$208, was properly sustained. The aver-

ments of this amendment did not meet the issues presented by the petition. If there was another and different contract of release than that set up by the plaintiff, it might possibly have been competent evidence as tending to disprove the contract set up in the petition. But this is doubtful, and, at any rate, no such written release was offered in evidence. And, if it had been admitted, it could not have affected the finding of the jury, the proof of the contract as alleged by the plaintiff being uncontradicted. The instructions presented the law of the case, and the judgment is affirmed.

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CASE 54—ACTION OF COVENANT—APRIL 26.

Turner, Etc. v. Johnson.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. APPEALS—BILL OF EXCEPTIONS.—Upon the former appeal in this case the bill of exceptions was stricken from the record because it has not been filed in time. Upon the second trial of the case this bill of exceptions was by consent read as evidence. Upon this appeal the certificate of the clerk shows that this record together with what was copied on the former appeal constitutes a complete transcript of all the proceedings in the case. It is thereupon held that the motion to strike the bill of exceptions from the transcript should be overruled.
2. CONFLICT OF LAWS—LAW OF FORUM CONSTRUING BOND.—In the absence of allegation and proof that under the laws of Missouri where the bond was executed, a different effect is to be given to it from that under the laws of Kentucky, the presumption will be indulged that the law of the place of the contract is the same as the law of the forum.
3. BOND—CONSTRUCTION OF.—By the bond in suit, the appellee bound

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120 534  
120 535

himself to pay the appellants a reasonable and fair rent of the property during the time the appellants were kept out of its possession and any damages they sustained from waste or injury to the property during the time. Under this covenant the appellants were entitled to recover, first, the reasonable rental, and, second, the waste committed while appellee remained in possession.

4. EVIDENCE—PREPONDERANCE OF.—The court in this case examines the evidence and finds that the chancellor's finding of facts is not palpably against the weight of the evidence, either as to, first, the rents, and, second, the waste. The fact that the renting by the appellee was at public out-cry to the highest and best bidder, is not conclusive that the rent thus obtained was a fair and reasonable rent.
5. TAXES.—The appellee was entitled to credit for the taxes paid by him upon the land during the time he was in possession.
6. Appellee was not entitled to credit for the amount of the Martin debt because the evidence shows that the debt was paid before it was assigned to him, and was not a live claim in his hands.
7. Allowances of items not covered by the bond. The court did not err in refusing to allow the appellee credit for \$111, compound interest upon the Green debt, which constituted a lien upon the land in controversy. This interest did not constitute an element of damage covered by the bond.
8. BASIS OF COMPUTATION OF MUTUAL CLAIMS.—It was error on the part of the court to allow the claimants as against each other interest on their respective claims from the date they accrued, especially as some of the claims bore interest at eight per cent. and others at six. The cost of the Superior Court should be credited as of the date it was due, and subject to these credits, interest should be counted in favor of appellants as in partial payments down to January 8, 1892, and after deducting from the sum then due, the amount then paid, \$4,403.59, the appellants should have interest on the balance due them from that date until it is paid. The amount of \$506 to Thomas E. Turney for his fee should be credited as of date January 1, 1887, on the amount then due.

**T. TURNER, FOR THE APPELLANT.**

Counsel argued chiefly upon the facts as they developed from the evidence in the record.

Upon the questions of law, the citations were as follows: Rankins

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Turner, &c., v. Johnson.

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v. R. R. Co., 2 Mo., 167; Buford v. Pickett, 3 Mo. App., 105; Seattle v. Gilchrist, 4 Wash. St. Rep., 509; Am. Digest for 1893, 1939; Inez v. Quinn, 22 N. Y. St., 261; 159 Pa. St., 99; N. Y. Syndicate v. Frazier, 130 U. S., 611; Van Rensaleer v. Moule, 16 N. Y. St., 465; Lou R. R. Co., v. Cox, 50 Ill. App., 380; Douglass v. Bates, 26 Ill. App., 369; Russell v. Hayden, 41 N. W. R., 456; Richardson v. Buckler, 8 Ky. Law Rep., 617; Holt v. Crum, Litt. Sel. Cas., 499; Coleman v. Allen, 3 J. J. Mar., 229; Gregory v. Ford, 5 B. Mon., 480; Marshall v. Marshall, 12 B. M., 461; Jones v. Letcher, 13 B. Mon., 371; Tucker v. Hood, 2 Bush, 85; Hart v. Smith, 2 A. K. Mar., 301; Starkie on Ev., pp. 36, 51, 85; Taylor on Ev., Sec. 317; Wharton on Ev., Secs. 29, 75, 175, 447-8; Greenl. on Ev., Secs. 52, 59 and notes; Best on Ev., ch. 5, book 3, part 2, p. 487; Sec. 512, same 519; Powell on Ev., (4th ed.) 91, 140; Amer. Ed., of Best Principles of Ev., 100, 487 to 570, and notes; Bentham on Ev., 3 vol. 419; Alphons v. U. S., 2 Story, 421; Wood v. Peck, 5 vol. (new series) Am. Law Reg., May, 1883; Wolf v. Hunter, Sup. Ct. of Ky., April 11, 1894; Hoskins v. R. R., 1 Mo. App., 454; San Diego v. Neal, 3 L. R. A., 83 and notes; Maysville v. Schultz, 3 Dana, 10; Robb v. Mt. Sterling, &c. Tp. Co., 3 Met., 117; Henderson, &c., R. R. v. Dickerson, 17 B. M., 175; Constant v. Lehman, 52 Kan., 229; Montgomery v. Sayre Cent. Law Jour. 1, 122, p. 100; 106 U. S. Rep., 611; 7 U. S. Dig., 325-130; 4 Am. & Eng. Ency. of Law, 566; and authorities cited; 2 Sedgwick on Damages (7th ed.), 606; 10 Bush, 185; Searcy v. Reardin, 3 Bibb., 529; Lucas v. Mitchell, 3 Mon., 247; Dawson v. Lee, 83 Ky., 49; Garrett v. Finnell, 2 Duv., 166; Frances v. Frances, 18 B. M., 46; Gardner v. Sously, 3 Litt., 426; Caldwell v. White, 3 Dana, 31; Oden v. Elliott, 10 B. M., 315; Bruce v. Stout, Hardin, 225; Voorhees v. Bennen, 2 Bibb., 572; Bowen v. Sebree and wife, 2 Bush, 112; Warfield v. Gardner, 79 Ky., 583; Murphy v. Estis, 6 Bush, 330; Ellen v. Murphy, 9 Bush, 587; Wickliff v. Hill, 4 Bibb., 269; Fible v. Caplinger, 13 B. M., 464; Riddle v. Louis, 7 Bush, 197; Guthrie v. Wickliffe, 1 Mar., 584; Taylor v. Knox, 5 Dana, 470; Bell v. Kench, 80 Ky., 42; R. R. v. Ramsey, 3 Ky. Rep., 385; Kenton v. Ins. Co., 12 Ky. Law Rep., 291; 7 Am. & Eng. Ency. of L., 492; Cavendish v. Troy, 41 Vt., 99; Clifford v. Richardson, 18 Vt., 626; State v. Folwell, 14 Kan., 105; Taylor v. Monroe, 43 Conn., 36; Clark v. Baird, 9 N. Y., 183; R. R. v. Schultz, 43 Ohio, 270; Haskell v. Mitchell, 89 Am. Dec., 711; R. R. v. White, 166 Ill., 375; Chambers v. Britton, 28 N. W. R., 561; Chicago R. R. v. Smith, 33 N. E. R., 241; 100 Cal., 182; Topeka v. Martineau, 42 Kan., 387.

## STONE &amp; SUDDUTH AND JOHN C. MILLER, FOR THE APPELLEE.

1. The old bill of exceptions having been stricken from the records of this court, and not having been refiled, and not being part of the record of the lower court, nor taken down by an official stenographer, nor certified by the judge of the lower court, should be stricken from the files and disregarded. Civil Code, sec. 737; Ky. Stats., sec. 4644; Proctor Coal Co. v. Finley, 17 Ky. Law Rep., 310; Hortsman v. Lex. & Cov. R. R. Co., 18 B. M., 218.
2. The testimony shows that the rents actually received and accounted for by Col. Johnson are equal to the rental value of the land, and that said land did not depreciate in value by reason of bad cultivation upon Col. Johnson's part, nor did he destroy or injure any of the improvements thereon. This is settled by two jury verdicts and by one judgment of a chancellor.
3. The findings of the chancellor upon questions of fact will not be set aside unless clearly wrong. Gifford v. Mullins, 9 Ky. Law Rep., 714; Davezac v. Seller, 93 Ky., 418; Francis v. Ramsey, 16 Ky. Law Rep., 870; Davidson v. Morrison, 86 Ky., 397.
4. The allowances as credits to appellee of taxes and attorney's fees paid in this case, being necessary to protect the land, were proper.
5. The demand of appellant being unliquidated, it was proper to charge interest on the off-sets of appellee up to the date of the liquidation of appellant's demands by judgment.
6. Both parties to the supersedeas bond living in Kentucky, the appeal bond was payable there, and should be construed by the laws of this State.
7. The law as laid down in the case of Turner v. Johnson, 95 Mo., 441, is the law of this case, and appellee should only be charged with the actual rents received. Morris v. Budlong, 78 N. Y., 543; Moore v. Cable, 1 Johnson's Chancery, 384; Jones on Mortgages, vol. 2, sec. 1123.
8. In estimating the value of these lands, their actual condition and not what they would be worth under hypothetical circumstances, is the true criterion. Rogers on Expert Testimony, 376, 349; Sedgwick on Damages, vol. 1; sec. 244; Pittsburg, &c., Ry. Co. v. Vance, 115 Pa. St., 332.
9. Testimony as to what adjacent lands rented for is incompetent. The case of Ewing v. Beauchamp, 4 Bibb., 496, explained. Testimony as to public rentings is competent to establish reasonable rental value. Sedgwick on Damages, sec. 243; Kent v. Whitney, 9 Allen (Mass.) 62; Brigham v. Evans, 113 Mass., 540; Smith v. Mitchell, 12 Mich., 180.

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Turner, &c., v. Johnson.

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A. A. HAZELRIGG FOR THE APPELLANTS IN A PETITION FOR A REHEARING.

STONE & SUDDUTH AND JOHN C. MILLER FOR THE APPELLEE IN A PETITION FOR A REHEARING.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

This is a second appeal of this case. The opinion on the former appeal will be found in 18 Ky. Law Rep., 202; [31 S. W., 1028], and as the facts of the case are fully stated there, they need not be repeated here. On the return of the case it was transferred to equity, and, the court having allowed appellants less than they were willing to accept, they have again brought the case to this court, appellee taking a cross appeal.

At the threshold we are met with a motion to disregard substantially all the proof in the case, on the ground that it is not properly before the court. This objection arises in this way: When the case was last here, this court struck out the bill of exceptions because it had not been filed in time, and this part of the transcript was then withdrawn from this court by appellants, and on the trial below, by consent of parties, and for convenience, this bill of exceptions was read; and the clerk, in making out the transcript, has only copied the record made since the last appeal, but he certifies that this record, with what was copied on the former appeal, constitutes a complete transcript of all the proceedings in the case. The judgment appealed from shows what was read on the trial, and the old record being now filed with the new, and both duly certified by the clerk, we see no substantial objection to the record as it is presented; and the conclusion heretofore reached, overruling the motion to strike out the bill of exceptions, is now adhered to.

The court below properly held that the effect of the bond

sued on must be determined by the law of Kentucky. There is no allegation that the laws of Missouri gave the bond a different effect from the laws of Kentucky. The law of another State must be pleaded, and, unless it is alleged to be different from our law, the legal effect of an obligation must be determined by the laws of Kentucky.

Tested by our law, the bond sued on obligates the appellee to pay appellants the reasonable and fair rent of the property during the time he was kept out of the possession of it by reason of the bond, and any damages he sustained from waste or injury to his property during this time. The evidence of the public renting of the property and the amount appellee received for the rent is competent to be considered in determining what was a fair rent, but it is not conclusive. In determining this question, we have had great difficulty. The proof shows: There were 2,735 acres in the tract. That it was a very valuable piece of land—worth \$20 or \$25 per acre. Six hundred and forty acres of it were in timber, 374 acres were old plow lands, and the rest of it was in grass lands or new plow lands. In 1885, 266 acres were new plow lands, and 1,455 acres were in grass. In 1886, 1887, and 1888, 586 acres were new plow lands, and 1,135 acres in grass.

There is some conflict in the proof on these points, but we think the weight of the evidence establishes the figures given. The contrary proof is mere estimate, and does not appear to be based on positive knowledge. As to the reasonable rent of the different character of lands for the four years in contest, the proof is also very conflicting, and wholly irreconcilable. Seventeen witnesses for appellants put the fair rent of the new plow lands at \$3 an acre for each year; three of their witnesses put it at \$3.50 or \$4, and two at \$2.50—none putting it at less than this. On

the other hand, a number of the witnesses for appellee put it at about \$2 a year—some a little lower, and others a little higher. Several of them put it at \$2.25, and appellee himself, when on the witness stand, stated that most of it was worth \$2.25 an acre.

As to the grass land the proof was equally irreconcilable. Thirteen witnesses for appellant place its fair rent at \$2 an acre and over, and five at \$1.50. Two witnesses for appellee put it at \$1.50, two at \$1.25, one at \$1, and several at less than this. Appellee not being allowed to testify on the subject, as he had not seen the grass, it was avowed that he would state it was not worth exceeding \$1.25 an acre.

The same conflict of evidence occurs as to the old plow land; the proof for appellants putting it at considerably over \$1 an acre, and the proof for appellee at \$1 or less. Appellee averred that he would state that it was not worth exceeding 75 cents to \$1 an acre.

The land is shown to have been good bluegrass land, equal to the bluegrass land of this State, and producing from forty to fifty bushels of corn to the acre when in good condition and properly worked. But there were only three houses on the entire tract of 2,700 acres, and it was difficult to rent out the land in large bodies at such prices as might have been obtained if there had been more houses, and it could have been subdivided into smaller tracts. We concur in the conclusion of the judge below that appellants should not be limited to the amount appellee received for the land. He rented it at public outcry, and in large bodies, at less than the clear preponderance of the evidence shows was a fair rent. By the judgment of the



court it had been determined that appellant Turner was entitled to redeem the land, and to have possession, upon payment to the appellee of the amount due him, which was about \$18,000, of which \$13,236 was bearing interest at 8 2-3 per cent. and \$3,181 at 10 per cent. Turner was kept out of possession for four years by reason of the bond sued on, and at the end of that time had to pay appellee the amount due him, with interest at these rates for the time, besides the cost of action. Under such circumstances, we think appellee should be held responsible to Turner for such rent as he might have realized from the place by diligence, and for any damages done to the property by appellee's improper management of it.

The proof for appellants shows that the timbered land was set more or less in grass, and they claim that it was worth for pasturage at least \$1 an acre. On the other hand, the proof for appellee shows that the grass was only in patches, that the bushes on much of the land were very thick, and that, in the condition and situation of the land, it could not reasonably be rented so as to bring in anything.

The discrepancy in the testimony of the witnesses as to the fair value of the rent may perhaps be accounted for, in a large measure, from the fact that some had in mind its intrinsic value, and others what it would have been practicable to realize from it, considering the situation of the land, the amount to be rented, and the difficulty of renting it in small bodies without more tenant houses. Under all the circumstances, we have concluded that little ought to be allowed for the rent of the timbered grass land, on account of the difficulty of making it available. The proof shows that in the subrenting a great deal of the new

plow lands was put at \$2 an acre, and that there was difficulty in renting for its full value such a large body of land as this—especially the grass land—with no more fences or houses than this had on it. Considering all the facts, we have reached the conclusion that, taking it one year with another, \$2 an acre for the new plow land, and \$1 an acre for the old plow land and the open grass land, considered as a whole, will be a fair rent. Figuring out the rent on this basis, we have made it about the same as the circuit judge, and so adopt his figures for the rent of the land. We also concur in his conclusion that appellee should not be allowed any credits for the expense of renting out the land or collecting the money.

It was the duty of appellee to use the property and take care of it just as a prudent owner would use his own property. It was waste to fail to keep it in reasonable repair. The rule of care required in this case is different from that required of an occupant seeking a rescission where he is not in fault as to the holding. Appellee was in the wrong, and if, while he held the property by means of the machinery of the law, he let it go to waste for lack of the attention that a prudent owner would give his own property, he is responsible for the damages thereby resulting to appellants. It was his duty to see that the tenants took proper care of the property, and that no waste was done by them or by the railroad company while it was held by him.

The proof is very conflicting as to the condition of the land when the bond was given and its condition at the time that the property was turned over to appellant Turner in 1899. The proof for appellants shows that it was very much damaged during this interval. The proof for appellee is to the effect that there was little or no damage to the property. A jury to whom the case was submitted fixed

this damage at \$914. We have concluded that this verdict is fully sustained by the evidence, and adopt it as our judgment on this branch of the case, to be allowed as of date January 1, 1889, and to bear interest from that time.

We have no doubt that the witnesses testifying to a much larger damage than this spoke truly; but a large part of these damages was necessarily incidental to renting the land out for so many years, and its mode of cultivation. Appellee did not see the land, in person, from the year 1885 until the year 1889. The proof does not show that he had any agent there who exercised such care for the property as the owner of it would ordinarily exercise. The tenants seem to have been left largely to follow their own inclinations, and it would seem that a part, at least, of the damages done by the railroad would not have occurred if such care had been exercised by appellee as farmers usually exercise under such circumstances. The fencing was in very bad condition when the property was delivered to appellant Turner. The houses had been neglected and allowed to suffer from want of repairs, and the mode of cultivation of the land and the treatment of the fences by the tenants could never have occurred if the party in charge of the property had exercised such care as the owners of such property usually exercise. The evidence justifies a larger allowance, but, as the jury fixed the amount indicated, we have concluded to follow their finding.

The proof shows that the rent was made payable at the time the taxes were due. The court below appears to have fixed correctly the amount paid for taxes by appellee. He properly credited appellee by these amounts, as the taxes on the land had to be paid, and it was immaterial to Turner whether they were paid by him or appellee. From the rent for each year as fixed above, the taxes for that

year should be deducted, and interest counted on the balance from the first of January of the next year.

The proof does not sustain the allowance to appellee of the Martin debt. The circumstances, the written assignment on the stock and the weight of the evidence, all show that the stock was assigned in payment of this judgment, and not as collateral security for it. The court erred in allowing appellee this credit, and it will be omitted in entering judgment on the return of the case.

The refusal of the court below to allow appellee credit for the \$111 compound interest paid on the Greene judgment is earnestly complained of, but it seems to us that in this the court ruled properly. Appellants declined to plead usury. The proof did not show want of consideration for the promise contained in the note, and the understanding about not collecting the money according to the terms of the writing seems to have been largely a reliance on Greene's liberality, without any consideration supporting it. He declined to take the note without this stipulation in it, and, when the money was not paid to him in the absence of a plea of usury he might have collected the debt, with interest, according to the terms of the writing. The court properly allowed appellee credit for the attorney's fee paid in the railroad case, for it was necessary for him to employ counsel in that matter; and he properly declined to allow appellant Turner's fees and expenses in defending the appeal in Missouri. These are not covered by the terms of the bond.

But the court erred in his manner of stating the account. He allowed appellants and appellee each interest on their respective claims from the time they accrued to the date of the judgment. This was prejudicial to appellants, especially in view of the fact that a part of appellee's claims

were bearing interest at a greater rate than 6 per cent. The interest on the Samuels debt of \$437.75 should be counted at 8 per cent. from July 16, 1885, to December 18, 1888, when appellee purchased it, and the amount then due on this debt should be credited as of that date on the amount owing by appellee for rent. In the same way, the interest on the Bourne judgment should be counted to November 1, 1888, and credited as of that date on the account. The McNamara judgment should be credited with the interest due January 7, 1889, and the John D. Perry judgment, May 19, 1891. The cost in the Superior Court should be credited as of date it was due. And, subject to these credits, interest should be counted in favor of appellants, as in partial payments, down to January 8, 1892; and after deducting from the sum then due the amount then paid, \$4,403.59, appellants should have interest on the balance due them from that date until it is paid. The \$50 paid Thomas E. Turner for his fee should be credited, as of date January 1, 1887, on the rent then due.

The judgment is therefore reversed, and the cause remanded, with directions to the court below to enter a judgment in conformity to this opinion.

We see no error in the judgment to the prejudice of appellee, and on the cross appeal it is affirmed.

CHIEF JUSTICE HAZELRIGG NOT SITTING..

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Smith v. Robertson, &c.

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CASE 55—ACTION ON <sup>1</sup>/<sub>2</sub> CONTRACT—APRIL 27.**Smith v. Robertson, Etc.**

APPEAL FROM FAYETTE CIRCUIT COURT.

**CONTRACTS—AGAINST PUBLIC POLICY—UNLICENSED STALLION.—THE**  
owner of an unlicensed stallion may not maintain an action for  
the service of such stallion.

WEBB &amp; FARRELL FOR THE APPELLANT. (Brief not in the record.)

NO APPEARANCE FOR THE APPELLEE.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

It is substantially alleged in the petition in this action that in the year 1895, the plaintiff, Smith, was the owner of a stallion known as Imp. Deceiver; and that the defendants, George L. and Eva M. Robertson, were the owners of a chestnut mare, and that by agreement between plaintiff and defendants said mare was bred to the said stallion, and that by the terms of said agreement defendants promised and agreed to pay plaintiff the sum of \$150 for the services of said stallion, to be due and payable when said mare had a foal by said stallion; that upon the 3d of April, 1896, said mare produced a foal, the get of said stallion; and that the services of said stallion were worth the sum of \$150, which sum the defendants promised to pay for a foal. The plaintiff claimed a lien upon said colt, and instituted this action to obtain a judgment against the defendants, and for an enforcement of their lien upon said colt.

The first paragraph of the answer pleaded a defect of parties, alleged that the stallion "Imported Deceiver" was owned by Samuel Smith, S. C. Lyon, Nat Pettit, and others, unknown to the defendants, and that plaintiff, Smith,

owned only one-eighth interest in said horse; hence they prayed that plaintiff's petition be dismissed. In the second paragraph it was pleaded, in substance, that, when said colt got by said stallion was foaled, defendants should have an option either to give to the owners of said stallion one-half interest in said foal at weaning time, or pay to the owners the sum of \$150, and that they determined, instead of paying the \$150, to give said plaintiff and his associates one-half interest in said colt, and so notified plaintiff about the 1st of May, 1896, and alleged that they were now willing and able to do so. In the third paragraph it is substantially alleged that the plaintiff nor any of his associates had paid any license fee in Jessamine county, where said stallion was during the season of 1895, and relied upon the statute in such cases made and provided in bar of plaintiff's right to recover.

The court overruled the plaintiff's demurrer to the first and second paragraphs of the answer, but sustained the demurrer to the third paragraph.

The reply may be treated as a traverse of the remaining paragraphs of the answer, and also showed a right of plaintiff to recover the \$150 under an arrangement between himself and the other joint owners, providing the same could, in law, be collected. The rejoinder may be treated as a traverse of the reply.

After the issues were fully made up, and proof taken, the court adjudged in favor of the defendants, and dismissed the petition of plaintiff, and from that judgment this appeal is prosecuted.

It is insisted for appellant that the burden of sustaining the agreement between the parties as to the option of defendants to give plaintiff one-half interest in the colt instead of paying \$150 is upon the defendants, and that they

have totally failed to sustain the defense by even a preponderance of the evidence.

The question first to be disposed of is as to the correctness of the ruling of the court in sustaining the demurrer to the third paragraph of the defendants' answer; in other words, the main question for decision in this case is whether the owner of a stallion, who has not procured a license to stand same, can recover for the services of the stallion.

It is not disputed but what the Kentucky Statutes require license to be paid by all persons who stand stallions for hire; and it is further provided by law that, if a person is engaged in such business without license, he is liable to a fine of not less than \$50 nor more than \$1,000. But it is suggested that the statute in question is a statute for revenue, and not for any other purpose, and that a contract for the services of an unlicensed stallion may nevertheless be collected, although a penalty is denounced against the keeper of such stallion if he stands the same without license. This question is discussed in *Buckley v. Humason* (Minn.), 16 Law Rep. Ann., 423, note (s. c., 52 N. W., 385), in which the following from Mr. Benjamin is quoted with apparent approval. It is there stated:

That, where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. Secondly. That, when the question is whether the contract has been prohibited by statute, it is material, in construing it, to ascertain whether the Legislature had in view solely the security and collection of revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts or the promotion of some object of public policy. In the former case the inference is that the statute was not



intended to prohibit contracts, in the latter that it was. Thirdly. That in seeking for the meaning of the law-giver it is material also to inquire whether the penalty is imposed once for all on the offense for failing to comply with the requirements of the statute, or whether it is a recurring penalty repeated as often as the offending party may have dealings. In the latter case the statute is intended to prohibit contracting, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced.

Section 4201, c. 108, Kentucky Statutes, provides: "Any person who shall engage in any business, or sell or offer to sell any article on which a license is required before procuring a license, and paying the tax thereon as required by law, shall be deemed guilty of a misdemeanor, and on conviction be fined not less than \$50 nor more than \$1,000 for each offense, unless otherwise specially provided."

It will be seen from this statute that a person furnishing the services of an unlicensed stallion for hire or compensation would be liable to indictment, and subject to a fine for each offense. Each contract or service so rendered or performed would evidently be a separate offense, hence it seems that such action would bring the offending party within the rule announced above.

In section 547, Bishop on Contracts, it is said: "And the rule is that, when the statute forbids a particular business generally, or to unlicensed persons, any contract made in such business by one not authorized, or made with the view of violating the statute, is void. Within this principle is the sale of goods to be used in the business from one who has knowledge of the proposed use."

And in section 549 it is said: "The law, for convenience

for adaptation to our infirmities, and, to some degree, from necessity, has, besides its doctrine of fundamental right, rules more or less technical, and a policy of the like sort. So it must refuse to enforce—or, in other-words, it must hold void—contracts which violate such rules or policy. *A fortiori*, it can not recognize as valid any undertaking to do what fundamental doctrine or legal rule directly forbids. Nor can it give effect to any agreement the making whereof was an act violating law. So that, in short, all stipulations to overturn, or in evasion of, what the law has established; all promises interfering with the working of the machinery of the government in any of its departments, or in obstructing officers in their official acts, or corrupting them; all detrimental to the public order and public good, in such manner and degree as the decisions of the courts have defined; all made to promote what the statute has declared to be wrong—are void. If the court should enforce them, it would employ its functions for undoing what it was established to do. The act would be in the nature of suicide.”

In *Wood v. Armstrong*, 54 Ala., 150, 25 Am. Rep., 671, it is said: “Where a statute pronounces a penalty for the act, a contract founded on such act is void, although the statute does not pronounce it void, or expressly prohibit it.”

On page 675 of 25 Am. Rep., a number of English authorities are referred to. *Law v. Hodgson*, 2 Camp., 147, was an action for the value of bricks smaller than the statutory dimensions, and the statute simply fixed a penalty for violation. The statute only declared that bricks shall be made of certain dimensions. Lord Ellenborough said: “The first section of this statute [17 Geo. III. c. 42] absolutely forbids such bricks to be made for sale. There the

plaintiff, in making the bricks in question, was guilty of an absolute breach of the law, and he shall not be permitted to maintain an action for their value."

*Brown v. Duncan*, 10 Barn. & C., 93, was an action on guaranty for sales of liquors which were distilled without license under a statute which fixes a penalty. It was held that, these being mere revenue regulations, a breach did not render the act so illegal as to prevent a recovery for sales. The case was distinguished from the brick case, on the ground that this statute was only to protect revenue, while the other was to protect public good.

The same doctrine was announced in *Johnson v. Hudson*, 11 East, 180, in respect to the importation of tobacco.

But in *Cope v. Rowlands*, 2 Mees. & W., 157, this distinction is overruled, the court saying that, if a contract be rendered illegal, it can make no difference in point of law whether the statute which made it so has in view the protection of the revenue, or any other object.

In *Drury v. Defontaine*, 1 Taunt. 136, Mansfield, C. J., said: "If any act is forbidden under a penalty, a contract to do it is now held void."

The statute of New York forbids the transaction of business in the name of a partner not interested in the firm, and requires that the designation "Co." or "Company" shall represent an actual partner, and violation of this statute is made a misdemeanor, punishable by fine. Under this statute it was held that all contracts in violation of it were absolutely void. *Swords v. Owens*, 43 How., Prac., 176.

To the same effect is the decision of *Hallett v. Novion*, 14 Johns., 273. Many other decisions to the same effect are found in the subsequent pages of the volume hereinbefore referred to.

Vanmeter v. Spurrier, 94 Ky., 22, [21 S. W., 337], was an action brought by Spurrier, etc., on a note given to the Thompson & Edwards Fertilizer Company by Vanmeter and others, the consideration being commercial fertilizer sold and delivered in sacks to the purchaser. Two distinct grounds of defense are stated in the answer, which is also made a counterclaim. The second defense was that by reason of the non-compliance with the provisions of an act to regulate the sale of fertilizers in this Commonwealth, and to protect agriculturists in the use of fertilizers, approved April 3, 1886, the note is void, and unenforceable. The statute required certain things to be done by the seller of fertilizers, and a further provision of the statute provided that any vendor of any commercial fertilizer who shall sell or offer for sale such fertilizers without first previously complying with the provisions of the act shall, upon indictment, and upon being found guilty, be fined \$100 for each violation or evasion. It further provided that the director shall receive, for analyzing the fertilizer, and fixed his services at the sum of \$15, etc. It was further provided that the director should pay all such fees into the treasury of the Agricultural or Mechanical College of Kentucky, to be used for the purpose of meeting the legitimate expenses of the station, etc. The court, in discussing the several questions involved said: "It is admitted that the retail price of the fertilizers sold to the appellants was worth over ten dollars per ton, and that no one of the packages had attached to it the sale label, as required by section 3 of the statute; and the main question, therefore, is whether the contract sued on is, by reason of such non-compliance with and disregard of the statute, void and unenforceable.

It is too well settled for argument that a contract pro-

hibited by statute will not, nor should be, enforced by the court. But whether the contract has been prohibited sometimes depends upon construction of such statutes when not clear in meaning, and we will at present assume that such is the case."

The court then proceeded to quote from Benjamin on Sales, which substantially embodies the quotation herein made from 16 Law Rep. Ann. [423]. The court then said: "Tested by either one of these rules, the statute in question would have to be construed as intended to prohibit the contract in case of non-compliance with, or breach of, its provisions; for the Legislature had in view, when enacting it, not only the security and collection of the revenue, even partly; but had in view the protection of the public from fraud in contracts for sale of fertilizers; and it is expressly provided, in section 4, the fine shall be imposed for each violation or evasion of the act.

"In *Lindsey v. Rutherford*, 17 B. Mon., 248, the following proposition, stated in Chitty on Contracts, was referred to with approval: 'A contract is void if prohibited by statute, though the statute only inflicts a penalty, because such penalty implies a prohibition. If the contract be illegal, it makes no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object.'

"But it was nevertheless there held that contracts for sale and purchase of bills of exchange were not prohibited by the statute then under consideration, which required each person conducting the business of brokers or exchange dealers to obtain a license, under penalty of a fine; the court being of opinion that the statute was to raise revenue, not to strike a blow at the business.

"But neither the conclusion in that case nor rea-

son for it affects the question before us; for there is a marked difference between a statute the prime or sole purpose of which is to secure or raise revenue by a license tax, and one enacted to protect the public against fraudulent sale of goods or for other reason of public policy. . . .

That a penalty implies prohibition in such case as this, though there be no prohibitory words in the statute, has been decided, not only by this court in *Lindsey v. Rutherford*, but by numerous courts in England, as well as in this country."

The court then quotes with approval from the case of *Wood v. Armstrong*, 54 Ala., —, heretofore referred to. From an early period of the history of this country persons desiring to stand a stud horse were required to obtain a license, and a penalty denounced against them for engaging in such business without license, and it can hardly be assumed that the sole purpose was to raise revenue, but manifestly one of the objects was to encourage men to procure and stand a superior breed of horses by excluding owners of inferior stock from engaging in such business, unless they would in like manner procure a license; it being reasonably presumed that the owner of inferior stock would hardly be able to obtain sufficient custom to justify him in licensing his horse.

In view of the authorities and reason heretofore given, we are of the opinion that no compensation can be recovered for the services of the stallion without his owner or keeper has procured a license as provided by law.

This conclusion dispenses with the necessity of considering whether the testimony in this case sustains the finding of the court below upon the issues presented, for it clearly appears from the proof, as well as from the rejected plead-

ing, that no such license had been procured licensing the stallion as required by law; hence it is immaterial whether the judgment of the court below was predicated upon a correct view of the law or not, its judgment being in fact correct, and in accordance with the law of the case. The judgment is therefore affirmed.

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CASE 56—LANDLORD AND TENANT—APRIL 28.

Meyer Bros.' Assignee v. Gaertner.

106 481  
137 352

APPEAL FROM CHANCERY DIVISION, JEFFERSON CIRCUIT COURT.

**LANDLORD AND TENANT—LIABILITY OF ASSIGNEE OF TENANT.**—An assignee of a lease who takes his assignment with the landlord's consent becomes liable for the rent subsequently accruing with a lien for its enforcement for one year's rent, and this liability can not be put off by him by an assignment of the remainder of the term.

**SAMUEL A. LEDERMAN** FOR APPELLANT, AND FOR APPELLEE ON CROSS-APPEAL.

1. An assignment of an unexpired term in a lease without the landlord's consent even against an express provision in the lease against assigning over without such consent is voidable only and can be taken advantage of by the landlord only by his re-entry and the declaring of a forfeiture. *Taylor Landlord & Tenant*, vol. 2, sec. 492; *Chautauqua Assembly v. Alling*, 46 Hun, 582; *Ready v. Amer. Brewing Co.*, 60 Ill. App., 50; *Webster v. Ingalls*, 104 Ill., 170; *Shattuck v. Lovejoy*, 8 Gray, 204; *Sayles v. Kerr*, 38 N. Y. S., 880.
2. One not a party to a contract within the statute of frauds can not plead the statute. *Kleeman v. Collins*, 9 Bush, 466; *Crawford v. Woods*, 6 Bush, 203; *Clary v. Marshall*, 5 B. M., 272; *Woods' Statute of Frauds*, p. 878; *Browne Stat. of Frauds*, sec. 135.
3. An assignment of a lease is the transfer of the entire term, no reversion remaining in the assignor. *Taylor Landlord & Tenant*, vol. 2, sec. 426; *Cox v. Fenwick*, 4 Bibb., 538.
4. An assignee of a term of rental is liable only in respect of his

## Meyer Bros.' Assignee v. Gaertner.

- possession. He bears the burden while he enjoys the benefit. Taylor Landlord & Tenant, vol. 2, sec. 449.
5. An assignee of a term of rental may always discharge himself from liability for subsequent breaches in respect to rent, as well as to other covenants, by assigning over, though it be done for the express purpose to get rid of his responsibility and although the second assignee neither takes possession nor receives the lease. Taylor Landlord & Tenant, vol. 2, sec. 452; Wood, Landlord & Tenant, 1881, ed., p. 546; Trabue v. McAdams, 8 Bush, 781; Muldoon v. Hite, 6 Ky. Law Rep., 663; Ready v. Am. Brew. Co., 60 Ill. App., 50; Tivvals v. Iffland, 39 Pac., 102.
  6. The provisions of the statute relating to landlord and tenant give to a particular class of persons advantage not enjoyed by any other class in the community. They are creatures of the statutes, their enforcement is by a summary proceeding, and they must be therefore strictly construed. Gedge v. Schoenberger, 83 Ky., 92; Stone v. Bohm, 79 Ky., 147; Petry v. Randolph, 85 Ky., 356.
  7. An act in derogation of the common law should be strictly construed and strictly pursued, and the party seeking the benefit of it must bring himself clearly within not only the spirit and meaning but the letter of the act. He can take nothing by intendment. Ball v. Lastinger, 71 Ala., 678; Hollman v. Bennett, 44 Miss., 322; Sutherland on Stat. Con., secs. 392, 393.
  8. Under the rules of strict construction of statutes an assignee of an unexpired term in a lease is not included within the operation of the terms of sec. 2317 of the Kentucky Statutes, chapter 75, title Landlord and Tenant; Ky. Stats., secs. 2305, 2307, 2316, 2317; Dishall v. Dandridge, 51 Miss., 55; Trabue v. McAdams, 8 Bush, 75; Muldoon v. Hite, 6 Ky. Law Rep., 663.
  9. The distinction between the words "under tenant" and "assignee" is fixed and definite. These words are legal, technical terms, each having a distinct definite meaning in law which we must presume the Legislature was familiar with when it enacted sec. 2317. An "assignee" is always an "assignee;" an "under-tenant" is never an "assignee," but always a "sub-tenant" or "sub-lessee." Taylor Landlord & Tenant, vol 2, secs. 448, 449; Idem, vol. 2, sec. 109; Woods' Landlord & Tenant, 1881 ed., pp. 132, 133, secs. 94 and 95.
  10. An assignment of his term by a tenant and delivery of possession of the premises destroys his privity of estate with the landlord but the privity of contract between them remains intact. Taylor Landlord & Tenant, vol. 2, sec. 436; Ready v. Amer. Brew. Co., 60 Ill. App., 50.
  11. The words in sec. 2317 "and such men shall not be for more



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Meyer Bros.' Assignee v. Gaertner.

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than one year's rent due and to become due" do not give an absolute lien to the landlord for one year's rent due and to become due, but are words of limitation marking the utmost limit within which a lien can exist, and this lien can be for no longer period than that of the rental. Black on Inter., p. 149 and 286.

KOHN, BAIRD & SPINDLE, OF COUNSEL, FOR APPELLANT.

On cross-appeal, counsel cited: Ky. Natl. Bank v. Louisville Bagging Co., 98 Ky., 381; Loth, &c., v. Carty, 85 Ky., 591; Civil Code, secs. 645, 646, 696.

C. B. SEYMORE, FOR THE APPELLEE. (Brief withdrawn.)

LEWIS M. DEMBITZ ON SAME SIDE.

1. It is immaterial whether Meyer Bros. were assignees or under-tenants of Gaertner. If assignees, with the consent of Gaertner they became tenants and directly liable; if they were under-tenants, their property became liable by virtue of sec. 2317 of the Statutes.
2. The Trust Company by assigning to Kling is estopped from denying that Meyers Bros. were assignees and tenants at the date of the deed of trust.
3. An assignee of a lease is a tenant to all intents and purposes. The original lessee may still be liable upon his covenant, but the assignee is liable by reason of his occupation. Taylor Landlord & Tenant, secs. 16, 109; Hicks v. Downing, 1 Ld. Raymond, 99; Parmenter v. Webber, 8 Taunt, 598; Hume v. Hendrickson, 100 N. Y., 17.
4. The word "tenant" in the Statute embraces assignee as well as an original lessee. Ky. Stats., secs. 2305, 2307, 2317.
5. The trick of assigning the lease to Morris Kling is wholly out of place in the whole business, for it can only have the effect of relieving the trust company from personal liability and this the appellee does not ask.
6. It might be considered a hardship that the goods of an under-tenant who may have rented the house for a single month, should be bound for the rent which the intermediate landlord is bound under the laws for a whole year, but the Statute can not be construed away by reason of this harshness; for it is only a partial recognition of the old medieval law which makes anything on the premises, even the goods of a stranger, except in a few enumerated cases, subject to the landlord's distress; and of the statute, 9 George 2, giving the landlord the one year's lien on all goods upon the premises, which statute

Gaertner's landlord's lien, which could have been asserted if no assignment had ever been made by the assignee of the term. The question thus presented is one of great interest, and has been elaborately and ably briefed.

It seems clear that the assignment by Rosenberg to Meyer Bros. in violation of the terms of the lease, as it was made without the landlord's consent, was voidable only, and could be taken advantage of by the landlord only, by re-entry and declaration of forfeiture of the lease. (Taylor's Landlord & Tenant, sec. 492). It is equally clear from the record that if there be a difference between an assignment of a term, in whole or in part, and a subletting, this was an assignment; for it is stipulated in the agreed statement of facts that the remainder of the term was assigned. The original lessee had transferred his whole estate, therefore, and had no reversion, though he was still liable upon his covenant to pay the rent.

There was no privity of contract between the assignee of the term and the lessor. It is insisted that, as assignee, he was liable, only because of his possession, and so was only liable for covenant's broken while he remained in possession of the property, and for such rents as accrued after he took possession.

What effect does the assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is thus stated by Taylor (volume 2, section 452): "An assignee may always discharge himself from liability for subsequent breaches, in respect to rent as well as to other covenants, by assigning over, though it be done for the express purpose of getting rid of his responsibility, and although the second assignee neither takes possession nor receives the lease. And he

may assign to a beggar, a *feme covert*, or to a person who is on the eve of quitting the country forever, provided the assignment shall be executed before his departure, and even although the assignee may receive from the assignor a premium as an inducement to accept the transfer. The same result follows, notwithstanding the assignment of the lease remains in the hands of the solicitor of the assignor, who has a lien for the expenses of preparing it, or the lease contains a covenant not to assign; for the assignment destroys the privity of estate, which was the only ground upon which the assignee was liable, and, though the tenant's liability on his covenant to pay rent may subsist during the continuance of the lease, there is no personal confidence reposed in the assignee of the lease."

The question presented, therefore, is, has this rule been modified by statute, as to the property of the assignee on the premises? The statutes, so far as material to this controversy, are as follows:

"Rent may be recovered from the lessee or other person owning it, or his assignee or under-tenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or sub-tenant shall only be for the rent accrued after his interest began."

"A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or under-tenant found on the leased premises, and if the tenant has removed his property to another county the distress or attachment may be directed to such county."

"If after the commencement of any tenancy, a lien be created upon the property upon the leased

premises liable for rent, the party making or acquiring such lien may remove the property from the premises upon the following terms, and not otherwise; that is, by paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due; what is so paid and secured not being more altogether than a year's rent."

"All valid liens upon the personal property of a lessee, assignee, or under-tenant, created before the property was carried upon the leased premises, shall prevail against a distress warrant or attachment for rent. If such lien be created whilst the property is on the leased premises, and on property upon which the landlord hath a superior lien, for his rent, then to the extent of one year's rent, whether the same accrued before or after the creation of the lien, a distress or attachment shall have preference, and be first satisfied, provided the same is sued out is one hundred and twenty days from the time the rent was due."

"A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant or under-tenant, owned by him after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days." [Kentucky Statutes, sections 2305, 2307, 2314, 2316, 2317.]

Our statutes also provide as follows:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, is not to apply to this revision; on the contrary its provisions are to be liberally construed with a view to promote its objects." Ky. St., sec. 460.

Construing the sections above quoted under this rule, with a view to promote their object, we think it clear that they give the landlord a superior lien, for not exceeding one year's rent, due or to become due, on all the property of the tenant, sub-tenant, or assignee on the premises, subject to execution, the liability of the assignee or sub-tenant being only for the rent accrued after his interest began. Appellee, therefore, had a superior lien on all the property of appellant, as assignee of Meyer Bros., on the premises, for one year's rent, due or to become due, at the time it executed the assignment of the balance of the term to Kling. They had no right to make any assignment of the lease without the written consent of the appellee, and it certainly was not the intention of the statute that the tenant could, by a violation of the lease, and without the consent of the landlord, divest him of his lien on the tenant's property for his rent, and thus defeat the entire purpose of the statute.

Rosenberg had no right to assign his lease to Meyer Bros., but only the lessor could complain of this, and, he acquiescing in the assignment, Meyer Bros. became his tenants. An assignee of a lease, accepting the assignment of it, takes it subject to all the covenants contained in it; and so Meyer Bros., or appellant, as their representative, had no right to assign this lease to another. The law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of these statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord.

If, on the day before the assignment to Kling was made, appellee had taken out an attachment for the rent due or to become due under this lease,

would it be contended that his attachment might be defeated by the assignment made to Kling on the following day? The plaintiff may defeat the lien of his attachment by his acts, but nothing that the defendant can do alone can have this effect. But an attachment, if taken out, would have added nothing to the efficacy of the landlord's lien. The statute gave him a lien, with or without the attachment, and the property subject to the lien could as well be withdrawn from the operation of the attachment as from the operation of the lien given by the statute, by the act alone of the assignee or sub-tenant.

The doctrine that a lien is only an incident to a debt, and that where the personal liability is terminated the lien is gone, has no application to a statutory right like this. The landlord might be perfectly satisfied where his tenant assigned his term to another who filled the storehouse with goods, thus securing the rent; for, without regard to personal liabilities, he is given by the statute a superior lien on the goods for his rent, and it was never intended that after this was done the assignee could move out his goods at any time he pleased, and, by assigning the lease to a beggar, throw upon the landlord the entire loss of his rent.

Appellee's lien on the personal property of the assignee or under-tenant on the premises is simply a right *in rem* conferred by statute. Such rights often exist when there is no personal liability, as on the get of a stud for the services of the horse, or on the property of a married woman in favor of a mechanic before our enabling acts.

On the day that Meyer Bros. made the deed of assignment to appellant, appellee had a lien on the stock of goods for a year's rent, due or to become due. By that deed Meyer Bros. created a lien on the property in favor of all their creditors.

But this lien so created on the property in the hands of appellant was by the express provisions of section 2316, quoted above, subject to the lien of appellee; and appellant who was trustee for the creditors, and charged by law (Kentucky Statutes, section 74) with the duty of applying the proceeds of the property first to the discharge of the liens on it, could not by its sole act, without his consent, destroy appellee's lien, when the statute required it to be paid before other claims. Judgment affirmed.

THE WHOLE COURT CONSIDERED THIS CASE.

THE CHIEF JUSTICE AND JUDGES GUFFY AND DURELLE DISSENTING.

JUDGE DURELLE DELIVERED THE FOLLOWING DISSENTING OPINION:

I earnestly dissent from the opinion of the majority. This case is before us upon an agreed statement of fact, which, with the legal questions presented, is fully set forth in the majority opinion.

There was no privity of contract between the assignee of the term and the lessor. As assignee, he was liable because of his possession, and was liable for covenants broken only while he remained in possession of the property, and for such rents only as accrued after he took possession. Taylor's Landlord & Tenant, v. 2, section 449. He bore the burden so long as he enjoyed the benefit.

What effect does the assignment over by the assignee of a term have upon his liability for rents to become due thereafter? The rule, in the absence of statutory modification, is given in the majority opinion, as stated by Taylor (volume 2, section 452). To the same effect, see Wood on Landlord & Tenant, page 546.

It does not appear to be contended that this doctrine is changed, as to personal liability of the assignee over, by

the Kentucky Statute of landlord and tenant, but that the statute fixes upon his goods a lien, to the extent of the personal liability of the original lessee, within the limit of a year, as fixed by the statute. The statutes involved are found in sections 2305, 2307, and 2317 of the Kentucky Statutes, which are as follows:

"Sec. 2305. Rent may be recovered from the lessee or other person owing it, or his assignee or under-tenant, or the representative of either, by the same remedies given in the preceding sections. But the liability of the assignee or sub-tenant shall only be for the rent accrued after his interest began."

"Sec. 2307. A distress warrant or attachment for rent shall bind, and may be levied upon any personal property of the original tenant found in the county; and upon the personal property of the assignee or under-tenant found on the leased premises, and if the tenant has removed his property to another county, the distress or attachment may be directed to such county."

"Sec. 2317. A landlord shall have a superior lien on the produce of the farm or premises rented, on the fixtures, on the household furniture, and other personal property of the tenant, or under-tenant, owned by him, after possession is taken under the lease; but such lien shall not be for more than one year's rent due or to become due, nor for any rent which has been due for more than one hundred and twenty days. And if any such property be removed openly from the leased premises, and without fraudulent intent, and not returned, the landlord shall have a superior lien on the property so removed for fifteen days from the date of its removal, and may enforce his lien against the property wherever found."

The remedies referred to in section 2305 are the remedies by distress and landlord's attachment.



It is urged on behalf of appellee that, upon the theory that Meyer Bros. were assignees of the term, they became the tenants upon coming into possession. Says counsel for appellee upon this subject: "An assignee of a lease is a tenant, to all intents and purposes. The original lessee may still be liable upon his covenant of payment, while the assignee is liable by reason of his occupation; but the former is not a tenant after he has assigned and left possession, while the assignee in possession is a tenant"—referring to Taylor's Landlord & Tenant, sec. 16.

And again: "The assignee comes at once into privity with the landlord, and while he remains owner of the term under the assignment he is liable on all the covenants of the lease. 'An assignee is personally liable to the lessor upon all covenants which run with the land, the premises also remaining liable to a distress by the latter for the rent.' Id., sec. 109, and authorities quoted in note 6."

This is entirely true, as I think, and entirely in accordance with the doctrine quoted from Taylor. The assignee in possession is a tenant, in that he holds the land. But he holds it, not under contract with the owner, and has no privity of contract with him, but only privity of estate, which being terminated, his character of tenant ceases coterminously with his possession of the property.

It is sought, however, on behalf of appellee, by establishing the proposition that the assignee is a tenant, to subject his goods to a lien for the rent, co-extensive with the liability of the original lessee under his contract, subject only to the limitation that it shall not extend beyond rent for one year.

It is conceded by both sides that the remedy by distress

in Kentucky is not in any wise similar to the common-law right of distraint, but is purely statutory, in that it gives a lien upon, and right of sale of, the goods of the tenant; and this, in some instances, independent of the continuation of the relation of landlord and tenant. Conceding this to be true, it follows that, the lien being given independently of the contract rights existing between the parties, and the remedy for its enforcement being an extraordinary and frequently oppressive one, the statute must be strictly construed, and can not, by implication, be extended beyond the plain legislative intent.

This has frequently been held by this court. *Gedge v. Shoenberger*, 83 Ky., 92, and *Hutsell v. Deposit Bank*, 19 Ky. L. R., 1492, [43 S. W., 469].

"It is no mere remnant of the old common-law right," says counsel for appellee, "but it exists by virtue of the act of 1811. 2 *Morehead & Brown*, 1358."

Now to consider the statutes:

Section 2305 gives a remedy by distress or attachment against the lessee or other person owing it, or his assignee or undertenant, or the representative of either, providing that the liability of the assignee or sub-tenant shall only be for the rent accrued after his interest began.

Section 2307 provides what property shall be subject to levy, and under what circumstances.

But neither of these sections in any wise refers to the liability to secure which the lien is given, or alters such liability of person or goods from that which existed under the contract, or, at common law, arose out of the relations of the parties.

It has never been held that the property of the sub-tenant was liable for rent beyond the term of his tenancy.

Section 2317 gives the landlord a superior lien upon the

property of the tenant or under-tenant, but provides that such lien shall not be for more than one year's rent, due or to become due. It seems to be contended that this gives the landlord, by implication, a lien for one year's rent. But while it is generally true that the expression of one thing is to be construed, as the exclusion of others, it does not always follow that the converse of the rule is true.

In Black on Interpretation of Statutes, it is said (page 149): "It is sometimes said that the converse of this rule is equally available in statutory construction; that is, that the express exclusion of one thing will operate as the inclusion of all others. Thus, if a statute explicitly provides that a court, in certain cases, shall not impose a fine of less than \$100, this implies the power to impose a fine of \$100 or more. But this inversion of the rule is to be applied with even greater caution than the rule itself. We should not infer the inclusion of one thing from the exclusion of another, unless such an inference is very clearly in accordance with the intention of the Legislature, or unless it is necessary to give the statute effect and operation. Particular care should be observed in resisting the conclusion that the express shutting out of one thing will necessarily let in its opposite."

And in the case at bar it would seem clear—assuming that counsel for appellee is correct in his contention that an assignee of a term is included under the word "tenant" in the section mentioned—that the lien given extends for rent, not to exceed one year, for and during the continuance of the term of the person whose goods are to be subjected to its payment. The term of the original tenant extends until the expiration of his lease. The term of the assignee extends only until his relation of tenant, ex-

isting solely by virtue of privity of estate, shall cease; and that ceases upon his assignment of his assigned term.

This conclusion is fortified by the reasoning in *Trabue v. McAdams*, construing an exactly similar statute in 8 Bush, page 75, where the lessees of mines had assigned the benefit of their lease to one McAdams. In a suit for the rent, McAdams claimed that he had assigned over the term assigned to him. Said this court, through Judge Lindsay:

"McAdams, not only by express agreement, but by operation of law, became the assignee of said lease, and thereby undertook the responsibilities of an assignee of an unexpired term." "Nor does his liability depend upon personal possession of the premises. By taking the transfer he was notified of the terms of the lease, and thereby accepted them, and undertook their performance. Nor could he discharge the undertaking, or relieve himself from liability as assignee, by anything short of an actual, absolute transfer or assignment of the entire unexpired term. Such an assignment, he insists, he did make to Looney; but, when the testimony in the case is carefully scrutinized, it does not, as we think, admit of any such conclusion."

And in 6 Ky. Law Rep., 663 (*Muldoon v. Hite*), it was held by the Superior Court that the assignee of a lease may always discharge himself from liability for subsequent breaches, both as regards rents and other covenants, by assigning over, even though it be done for the express purpose of getting rid of his responsibility.

These cases were apparently cases where the personal liability alone was sought to be enforced. But the reasoning of the *McAdams* case is extremely persuasive; and I am clearly of opinion that the goods of the assignee are not liable for rent to become due after the expiration of the assignee's

tenancy of the property, and that this may be terminated by an assignment over.

It is claimed that Meyer Bros. were sub-tenants, and that there is no real difference in legal liability between assignees and sub-tenants. The distinction seems to me, however, to be well marked. (Taylor's Landlord & Tenant, vol. 2, secs. 448, 449; and vol. 1, sec. 109.)

Assuming the doctrine laid down by Judge Lindsay in the *Trabue v. McAdams* case, *supra*, to be correct—and it has never been questioned in this state—we have, or may have, three classes of persons to whose property the lien given by the statute may be held to attach, viz., a tenant, the assignee of a term, or a sub-tenant. Each has a liability—the original tenant, by virtue of his covenant; the assignee and the sub-tenant, so far as the landlord is concerned; by virtue of their privity of estate. The statute gives a lien, in general terms, upon the goods of each of them for rent. As against the tenant, clearly, this lien applies to and secures only the rent “due or to become due” from him, with the limitation that it shall not exist for rent due for more than 120 days, nor for more than one year’s rent due or to become due. If his lease is by its terms to terminate at the expiration of a month, it can not be contended that the landlord has a lien for a year’s rent to become due. If, by its terms, his lease is terminable upon 30 days’ notice, can it be contended that the landlord has a lien, to be enforced by attachment, for a year’s rent to become due? Yet that is the logic of the majority opinion, for the assignee of the term, whose term is conceded to be terminable at any moment when he may assign to some one who will accept the assignment, whose position of tenant or holder of the property is thus terminable, may under this statute, be held for

a year's rent thereafter to become due, *not from him*, but from the man who contracted to pay it. And so, applying the doctrine to the case of a sub-tenant, one who holds a single storeroom in a large house, under a sub-lease which by its terms is to end in a month, must, under the majority opinion, be held, so far as his goods are concerned, liable for a year's rent for the entire property; and this was without any pretext that any of such rent, except one month's rent of the limited part of the property which he holds, is ever due or to become due *from him*.

Where a statute, in general terms, gives a lien for rent against the property of three distinct classes of persons, the fair, the just and the logical rule of construction would, it seems to me, be to hold that the lien given upon the goods of any one of the three classes mentioned should attach to his goods to secure and compel the payment of the liability for which he was responsible, and not for a liability incurred by some one else.

With a fair, reasonable, and just application of the statute confronting it, the majority of the court has chosen to apply the statute in a manner which may, and undoubtedly will, work manifest injustice. The construction for which I have contended could work injustice to no one. It would hold the assignee or the sub-tenant liable for everything they had ever agreed to pay to anybody, and could work no injustice to the landlord; for he would get, or could get, everything which had ever been contracted to be paid to him by any one. If he desired to hold his original tenant, there is no obligation upon him to execute a release. If the original tenant, being insolvent, undertook to remove his goods, they could be subjected to the landlord's claim by distress

warrant or landlord's attachment. And, in addition to these rights, he would be entitled to a remedy against the goods of the assignee and the goods of the sub-tenant for every cent which could legally or justly be demanded of them.

The majority opinion lays stress upon sections 16 and 17, c. 21, of the General Statutes (now to be found in section 460 Kentucky Statutes), as to the construction to be given statutes in derogation of the common law. This statute, which has, in part, been held merely declaratory of the common law, in so far as it provides that words and phrases shall be understood according to the common and approved use of language (*Bailey v. Com.*, 11 Bush, 688), has been frequently referred to as authorizing the court to apply a somewhat more liberal construction than prevailed at the common law, in order to effect the intent of the Legislature. When the intent is clear from the language of the statute, that purpose is to be carried out by the courts, although the language used may be inapt. But it does not authorize the court to assume a purpose not deducible from the language of the statute, and then to effect that imaginary purpose by applying the language to a state of facts not within its terms, as well as to the condition to which it is clearly applicable.

One other comment I desire to make upon the majority opinion:

It concedes that the assignment of the lease in violation of its terms could be taken advantage of by the landlord by re-entry, and declaration of forfeiture of the lease, only, and authority is referred to in support of this proposition. But, after so holding, the opinion, in its conclusion, holds that as the terms of the lease forbade an assignment, and as Meyer Bros., by accepting the assign-

Pulaski County v. Watson, Sheriff. Same v. Hart.

ment, took it subject to its covenants, they had no right to assign their lease, because, says the opinion, "the law suffers no man to profit by the violation of his own contract, and it would be a plain denial of the purpose of these statutes to allow an assignee of a lease to defeat the lien secured by it to the landlord by a wrongful act of his own, and without the concurrence of the landlord." That is to say, as against the assignee of a lease the landlord has a higher right than he has against the original lessee. Against the lessee, the landlord can only re-enter and forfeit the lease. Against the assignee, he can impose an additional penalty, by subjecting the assignee's goods to the payment of another's obligation.

The judgment, in my opinion, should be reversed.

CHIEF JUSTICE HAZELRIGG AND JUDGE GUFFY CONCUR IN THIS  
DISSENT.

CASE 57—ACTION ON SHERIFF'S BOND—APRIL 28.

Pulaski County v. Watson, Sheriff.  
Same v. Hart.

APPEAL FROM PULASKI CIRCUIT COURT.

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107 218

106 500  
109 556

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110 168

106 500  
114 515

106 500  
118 359

106 500  
127 384

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129 321

1. SHERIFFS—SETTLEMENTS—CONCLUSIVENESS OF.—A settlement made by a sheriff pursuant to the provisions of sec. 4146 of Kentucky Statutes is conclusive in the absence of any appeal, and in the absence of any plea of fraud.
2. COUNTY LEVY—VALIDITY OF.—A levy made by the county court directing the sheriff "to collect twenty-five cents on each one hundred dollars of the taxable property reported by the assessor for said year, and one dollar on each tithable reported by the assessor for said year" is sufficiently definite as the basis of a levy for the purpose intended.
3. COUNTY COURT—HOW COMPOSED FOR FISCAL PURPOSES.—As section 142 of the Constitution was not carried into effect until the first Monday in January, 1895, the county judge and the magis-



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Pulaski County v. Watson, Sheriff. Same v. Hart.

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trates of the county constituting the fiscal court as it was organized prior to the adoption of the new Constitution were authorized to fix a county levy for the year 1894.

4. **SAME—SPECIAL TERMS.**—There is nothing in the statute precluding the fiscal court from making a county levy at other than the regular terms thereof.
5. **SAME—LEVY PRIOR TO COMPLETE ASSESSMENT.**—A county levy laid at a special term in September is not invalid in that it is laid prior to the completion of the assessment.
6. **COUNTY LEVY—LIABILITY OF SURETY ON GENERAL OFFICIAL BOND.**—The sureties in a sheriff's official bond are liable for the county levy collected by him and not paid over. (Howard, Sheriff, v. Com., 105 Ky., 604.)

**CURD & SMITH FOR THE APPELLANT IN THE APPEAL AGAINST HART.**

1. Whether the bond sued on is or is not a valid statutory bond, it is good as a common law obligation. Com. v. Adams, 3 Bush, 41.
2. The bond is substantially in the language of the official bond of sheriffs and the defendant, the sheriff, and sureties are liable for all moneys that came to his hands as sheriff, except the revenue due the State. Ky. Stats., 4558.
3. The county court was authorized to make the levy; the court which made the levy for 1894 was to all intents and purposes the proper court, no matter under what head it was styled, and was composed of the officers who had the authority to make the levy, to-wit: the county judge and justices of the peace; and although it is styled in the order "county court," it was in fact the fiscal court. Con., sec. 144; Ky. Stats., sec. 1833.
4. The fiscal court had authority to make a valid levy at a term held in September, 1893. See Acts 1888, vol. 1, p. 51.
5. The sureties in the sheriff's official bond are liable for the county levy. Ky. Stats., sec. 1884; Maynard v. Com., 80 Ky., 587; Schuff v. Pflanz, 18 Ky. Law Rep., 28.  
(Same counsel in the appeal of Pulaski County v. Watson, sheriff, made the following points:)
6. The court should have sustained the demurrer to the second, third and fourth paragraphs of the defendant's answer because each and every one of them undertakes to plead as a set-off matters and amounts that can not be off-set against the fund sought to be recovered.
7. In sustaining the demurrers to the second paragraph of the plaintiff's reply, the court erred to the prejudice of the rights of the appellant in this: the said paragraph sets out the plea of estoppel to the defense of the appellee set up in his answer

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Pulaski County v. Watson, Sheriff. Same v. Hart.

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without denying the execution of any bond to collect the taxes sought to be recovered, that is the said J. H. Watson had filed suit in the Pulaski Circuit Court in which he alleged that he was the sheriff of Pulaski county and as such was by virtue of his office collector of the fund sought to be recovered from him in this action. 7 Am. & Eng. Ency. of Law, 1; and this plea of estoppel was admissible in the reply. Civil Code, sec. 98.

**W. S. TAYLOR, ATTORNEY-GENERAL, ALSO FOR THE APPELLANT.**

1. The settlement made pursuant to sec. 4146 of the Ky. Stats., and approved by the court is conclusive as to the amount of liability at the time of its approval.
2. The sureties in the official bond of a sheriff are liable for county revenue. *Howard v. Com.*, 105 Ky., 604.
3. The court as organized prior to the adoption of the new Constitution was the court to make the levy and it was authorized to make it at the September term, 1892.
4. The defendant had no right to plead a set-off against the claims sued for.

Citations: *Con.*, secs. 142, 144; *Ky. Stats.*, ch. 52, secs. 1885, 4175, 4147, 4146, 4145; *Cooley on Taxation* (2d ed.) pp. 175, 704, 108, 709, 776; *Waterbury v. Lawler*, 51 Conn., 171; *Clifton v. Winne*, 80 N. C., 149; *Mississippi County v. Jackson*, 51 Mo., 23; *Gilbert, &c., v. County of Daugherty*, 53 Ga., 194; *Johnson v. Goodridge*, 15 Maine, 29; *City and County of San Francisco v. Ford*, tax collector, 52 Cal., 198; *Treasurer v. Hilliard*, 8 Rich., 412; *Inhabitants Gorham v. Hall*, 57 Maine, 62; *Smyth v. Titcomb*, 31 Maine, 286.

**W. A. MORROW FOR THE APPELLEES.**

1. Under the statutes, the bond which was executed and is the basis of the action is not a county levy bond and in consequence the men who are on it are not responsible for any default of their principal in regard thereto. *Patton v. Lair*, 4 J. J. Mar., 252; *Kouns v. Davis*, 2 B. M., 280; *Brown, &c., v. Grove's Admr.*, 6 Bush, 2; *Schuff v. Pfanz*, 18 Ky. Law Rep., 25; *Ky. Stats.*, secs. 4556, 4558, 4133, 1884; *Anderson v. Thompson*, 10 Bush, 134; *Kenton County v. Lowe, &c.*, 91 Ky., 369.
2. The securities were not bound because no levy was made for the year in issue, or if there was any levy, it was not properly laid. The language of the order was too indefinite and uncertain to constitute a basis of liability. *Ky. Stats.*, sec. 1839; *L. & N. R. R. Co., v. Com., &c.*, 89 Ky., 541. The order was made by the Pulaski County Court and not by the fiscal court.

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Pulaski County v. Watson, Sheriff. Same v. Hart.

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3. The order could not have been properly made at the September term of the court.

**O. H. WADDLE ON SAME SIDE. (W. A. MORROW OF COUNSEL.)**

1. The position taken by counsel for the appellant that the bond sued on was good as a common law bond is not sound. It is only in cases of defective execution of statutory bonds that they can be held good as common law obligations. The bond sued on was executed in exact accordance with section 4130 of Ky. Stats., and in the exact language of section 4133, which section related only to the execution and renewal of sheriff's bond for the collection of State revenue and was not good for the collection of county revenue.
2. Section 4558 of Ky. Stats., does not make the security of a general official bond liable for the county levy. Section 4558 is identical with sec. 4, art. 1, ch. 91, Revised Statutes, and under the Revised Statutes it was held that the sureties in a sheriff's official bond were not responsible for the county revenue. No such liability ever existed in this State except under the act of 1882. *Ridgeway v. Morris*, 91 Ky., 581; Ky. Stats., sec. 4130.
3. The levy was not made by the court having authority, but if made by such court, it was not made at a time when it had authority to act. 12 Am. & Eng. Ency. of Law, 296; Same, note 2; *Wightman v. Krasner*, 20 Ala., 446; *Garlich v. Dunn*, 42 Ala., 404; *State v. Roberts*, 8 Nev., 239.
4. The evidence is insufficient to show that the order of the fiscal court was valid. Ky. Stats., secs. 1842-3.

**W. A. MORROW AND O. H. WADDLE IN A SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF W. S. TAYLOR.**

Citations: *Com. v. McClure*, Mss. opin. Feby. 24, 1899; *Coolley on Taxation* (2d ed.) pp. 324, 709, 712, 715; Ky. Stats., secs. 1882, 4046, 4059, 4130, 4133, 4131, 1884; *Com. v. Yarbrough*, 84 Ky., 496; *Com. v. Magoffin*, 15 Ky. Law Rep., 775; *Gilbert v. Bartlett*, 9 Bush, 49; *Greenwell v. Com.*, 78 Ky., 320; *Dawson v. Lee*, 83 Ky., 49; *Jacob's Admr. v. L. & N. R. R. Co.*, 10 Bush, 263; *Lyons v. Breckinridge County*, 19 Ky. Law Rep., 956.

**SAME COUNSEL FOR THE APPELLEES IN A PETITION FOR A REHEARING.**

Citations: 23 Am. & Eng. Ency. of Law, 468; *Black on Inter. of Laws*, pp. 350-1; *Doores v. Varnon*, 15 Ky. Law Rep., 245; *Bracken County v. Daum*, 80 Ky., 388; *Hall v. Smith*, 14 Bush, 604; *Marion v. Brewer*, 13 Ky. Law Rep., 821; *Wilson v. Linville*, 96 Ky., 50.

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Pulaski County v. Watson, Sheriff. Same v. Hart.

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JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

This is a suit against John H. Watson and his sureties upon a bond executed in accordance with the provisions of section 4133 of the Kentucky Statutes to recover the amount found to be due the county for county levy as shown by a settlement made with the Commissioners of the Fiscal Court.

The petition alleges that Watson was elected sheriff of Pulaski county in November, 1892, and that on the first Monday in January, 1893, he took the oath of office, and executed a bond for the faithful discharge of his duties as sheriff, under section 4133; that he collected and settled for the county levy for 1893, the settlement having been duly made with the commissioners appointed by the fiscal court, which was approved and put on record; that in January, 1894, he executed a new bond, under the provisions of section 4133 of the Kentucky Statutes, which was also accepted and approved by the court and recorded; and that thereafter the tax books containing the assessment for the State and county revenues for the year 1894 were delivered to him, and that on the 10th day of January, 1895, at a special term of the fiscal court of Pulaski county, he filed a settlement, showing a balance of \$9,411.41 due the county, under the provisions of section 4146 of the Kentucky Statutes, which provides that: "Each sheriff shall, when required by the fiscal court, settle his accounts of county or district taxes; and at the regular October term of each year the fiscal court shall appoint some competent person to settle the accounts of the sheriff of the money due the county or district. The report of such settlement shall be filed in the county court clerk's office, and be subject to exceptions by the sheriff or county attorney, who shall represent the Commonwealth and county, and the county court

shall try and determine such exceptions. An appeal may be prosecuted by either party from the judgment of the county court on such settlement, in the same manner as provided by law for appeals from judgments of the quarterly court," etc.—and, finally, that "the settlement, when approved, shall be recorded in the county clerk's office."

It appears that the provisions of this section were complied with. No appeal was prosecuted therefrom, and, in the absence of any plea of fraud, we are of the opinion that the balance found due upon such settlement is conclusive against the sheriff as to the amount of such indebtedness at that time.

The defendants seek to escape liability on several grounds: (1) It is insisted that no proper levy of the tax sued for was made by the fiscal court of Pulaski county. (2) That the levy was made at a term held in September, 1893, without any previous order of the fiscal court calling the court together at that time. (3) That the defendants are not liable for the county levy for the year 1894 by the terms of the bond sued on.

The testimony in the record shows that on the 23d day of September, 1893, the fiscal court of Pulaski county, the county judge and all of the magistrates being present, entered an order upon the records of the court by which it was "ordered that the sheriff of Pulaski county, for the year 1894, be and is hereby directed to collect 25 cents on each \$100 of the taxable property reported by the assessor for said year, and \$1 on each tithable reported by the assessor for said year, and pay same to the County Treasurer in accordance with the law for the purpose of paying claims against the county;" the order being signed by the county judge and attested by the county clerk. This order is headed "Pulaski County Court;"

and it is insisted because of this designation that it can not be treated as an order of the fiscal court of the county, and that it is too indefinite to be relied on as the basis of the levy for the purpose intended, and that it was made at a time when neither the court of claims nor the fiscal court had any jurisdiction to act, and is for this reason invalid, and conferred no power upon the sheriff to collect the levy authorized by it.

It seems to us that the order is sufficiently explicit. It directs the sheriff to collect 25 cents on each \$100 and a per capita tax of \$1, and, in our opinion, covers the ground required in such an order.

Section 1833 [Ky. St.] (act October 17, 1892), with regard to fiscal courts, provides that: "Each county shall have a fiscal court which shall consist of the judge of the county court and the justices of the peace for said county, and their successors in office, in which the judge of the county court shall preside if present."

And section 1838 provides that; this court shall be a court of record, and shall hold two regular terms in each year, commencing on the first Tuesday of April and October of each year and continuing until the business of the court is disposed of, but that the county court of any county may by an order of record fix a different date for the commencement of said terms; but provides that one of the terms shall be held in October; that the county judge shall have the power to call a *special* term of said court for the transaction of any business of which the court has jurisdiction whenever the necessity exists for a special session. And section 1839 provides that the fiscal court shall have jurisdiction to levy each year for county purposes a poll tax of not exceeding \$1.50 and an *ad valorem* tax on all property subject to taxation within the county.

It seems to us that there can be no question that the county judge and magistrates of the county were authorized to fix a county levy for the year 1894, as the provision of section 142 of the Constitution, which requires that each county shall be laid off into justices' districts of not less than three nor more than eight, and in each of which districts one justice of the peace should be elected as provided by section 99 of the Constitution, did not go into effect until the first Monday in January, 1895; and, so far as the Constitution is concerned, the old Court of Claims was not disturbed until after that time.

There is nothing in the statute which intimates that the fiscal court should not make the county levy at other than the regular terms thereof.

It is very strongly insisted for appellees that, as section 4046 provides that the assessor shall begin his duties on the 15th day of September in each year, and assess all property as of that date, and he is not required to return his tax book and schedule before the first Monday in January thereafter, and that section 4119 requires the Board of Supervisors shall convene at the county seat on the first Monday in January thereafter, there could be no basis for the county levy of taxes for 1894 earlier than the adjournment of the Board of Supervisors after their meeting on the first Monday of January; and as the levy in question was made on the 23d day of September, several months before it was possible for this basis to be reached, that it necessarily follows that the court had no authority to make such a levy.

This argument might just as well be extended and say that the fiscal court had no authority to make the levy for county purposes until after the State Board of Equalization had finished its work, which proba-

bly would not occur before the 1st of the following June. It is impossible in making a levy to do so with entire accuracy. At best, only an approximation of the amount required for county purposes can be determined. It is the universal rule now, so far as we have information, for the fiscal court to make these levies in October preceding the January at which the assessment is to be completed, and we are of the opinion that the levy made by the county judge and justices of the peace of Pulaski county on the 23d day of September, 1893, was valid, and that neither Watson nor his securities have any legal defense to this action on that ground.

The remaining contention of the sureties that they are not liable for the county levy by the terms of the bond has been very carefully considered by this court in the recent case of Howard, Sheriff, v. Com., reported in 105 Ky., 604, [49 S. W., 466], in which, after a careful consideration by the court, it was held that a sheriff's bond executed, under section 4133 of the Kentucky Statutes, for the faithful performance of his duties, secures the collection of the county, as well as the State, revenue. It is, therefore, unnecessary to discuss that question further in this case.

It appears from the testimony that, since the date of the settlement of January 10, 1895, appellee has paid \$6,400 to the treasurer of Pulaski county, and that he is also entitled to a credit of \$182.60, admitted by the county to be just; and he is also entitled to any other sums which may have been paid since the date of that settlement.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.



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Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

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CASE 58—ACTION TO RECOVER OFFICE—APRIL 28.

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Heyker v. McLaughlin, Etc.  
Same v. Herbst, President, Etc.

APPEAL FROM KENTON CIRCUIT COURT

**MUNICIPAL CORPORATIONS—CITIES OF SECOND CLASS—BOARD OF EDUCATION.**—In the absence of express legislative authority, the Board of Education of a city of the second class has no authority to enact a by-law providing that it shall require a two-thirds majority to elect a clerk of that board. Such a by-law is violative both of the common and statute law of the State.

**M. L. HARBESON, FOR THE APPELLANT.**

1. Charter Provisions. Ky. Stats., secs. 3226, 3212, 3231, 448.
2. Mandamus, the proper remedy in the proceeding against Herbst as president, &c. Clark v. McKenzie, 7 Bush, 523; People v. Pease, 27 N. Y., 45; 6 Am. & Eng. Ency. of Law, 311, 380, 385; Cassidy, Auditor's agent, v. Young, 13 Ky. Law Rep., 512; Batman v. Megowan, 1 Met., 533; Cox v. Kash, 1 Bush, 201; Howes v. Walker, 13 Ky. Law Rep., 530.
3. Want of power in the board to adopt the rule requiring two-thirds to elect a clerk, 15 Am. & Eng. Ency. of Law, pp. 1039, 1041 and 1043; 17 Same, p. 236; Dillon on Municipal Corps., sec. 317; J. Monroe Haskill v. Mayor and council of Baltimore, 65 Md., 125; s. c. 125 Am. & Eng. Corps. Cases, p. —; s. c. 57 Am. Reps., 308; Hewitt v. Craig, 86 Ky., 23; 15 Am. & Eng. Ency. of Law, 1042; 2 Am. & Eng. Ency. of Law, 706; Cadmus v. Farr, 47 N. J., 208.
4. The rule that in ordinary actions where the law and facts are submitted to the court, this court on appeal will not consider the question whether or not the pleadings sustain the judgment in the absence of a separation of the conclusions of law and facts and exceptions to the finding of law and motion for new trial, has never been adopted by this court. Union Ins. Co. v. Groom, 4 Bush, 292; Helm v. Coffey, 80 Ky., 176; Henderson v. Dupree, 82 Ky., 678; Albin v. Ellinger, 19 Ky. Law Rep., 1887.

**HARVEY MYERS, FOR THE APPELLEES.**

1. A rule adopted by a municipal legislative body requiring a two-thirds vote for the election of officers (the constating instru-

Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

ment of such body providing that the majority of the members elect shall be a quorum) is legal and binding.

2. The rules of a municipal legislative body having continuous succession, do not die with the expiration of the terms of the members who enacted same.

Citations: Ky. Stats., sec. 3212; Hyskell v. Morgan, 65 Md. 125; 15 Am. & Eng. Ency. of Law, 1046.

WM. A. BYRNE, ALSO FOR THE APPELLEE.

Counsel argued that the two-thirds rule which had been adopted by the board of education was a valid rule, and that it did not cease to be operative when the members of the board enacting it went out of office. In support of his contention, he cited: Ky. Stats., secs. 3212, 448, 3226; Beach on Private Corporations, vol. 1, ch. 16, sec. 308; Beach on Corporations, sec. 309; Bigelow on Estoppel, pp. 673, 679.

W. A. BYRNE AND HARVEY MYERS FOR APPELLEES IN A PETITION FOR A MODIFICATION OF THE OPINION.

Even although the two-thirds rule be invalid, it does not follow that the appellant is entitled to recover the fees of clerk of the board of education. McLaughlin's term was a four year term from January, 1896; it did not, therefore, expire until 1900, and at the time the appellant claims to have been elected there was no vacancy in the office.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

By agreement, these two actions are tried together. Both were instituted by appellant for the purpose of getting possession of the office of clerk of the Board of Education of the city of Covington, which office he claims he was elected to fill by a majority of the Board of Education in January, 1898, for a term of two years.

Appellant alleges that at a regular meeting of the Board of Education, then consisting of twelve members, held for the purpose of electing a clerk, in January, 1898, he received the votes of seven members of the board, and appellee McLaughlin received the votes of the other five members, but that the president of the board, refused to declare him elected to

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Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

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the office, and appellee McLaughlin, the incumbent, has refused to surrender the office.

Appellees admit that the election was held by the Board of Education, and that appellant received seven votes, but deny that by reason thereof he was elected clerk, for the reason that prior to the time of the election the Board of Education had adopted a rule providing that it should require a vote of two-thirds of the members composing said board to elect a clerk, and that this rule was in force and effect at the date of the election, and that appellant failed to receive the requisite two-thirds.

The legal question involved on the appeal in both cases turns upon the question as to the power of the Board of Education of the city of Covington to enact the rule requiring a vote of two-thirds of the members thereof to elect a clerk.

Section 3212 of the Kentucky Statutes provides for a system of public schools for the city of Covington, and that the said schools shall be under the control of a Board of Education, who shall be declared to be a body politic and corporate, with perpetual succession. They are given control and management of the public schools of the city, and the power to *make by-laws and rules necessary for the discharge of their duties and the government of their proceedings*. Section 3226 provides that "said board shall have the power to appoint a clerk; prescribe his duties and term of office, and fix his compensation;" and section 3231 provides that "the Board of Education shall elect from their own number a president for the term of two years, and may prescribe who shall preside in his absence, and make all necessary rules, prescribing the duties of the presiding officer and the government of themselves." By another section of the statutes it is provided that one-

Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

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half the members shall go out of office each year, all members being elected to serve for two years.

It is the contention of appellant that the Board of Education had no power to adopt the rule in question, because it was not expressly given by the statute creating them and defining their powers, nor conferred by the general power to enact by-laws, contained in section 3212. It is insisted that the rule is in conflict with section 448 of the Kentucky Statutes, which provides that "words purporting to give authority to three or more public officers, or other persons, shall be construed as giving such authority to a majority of such officers or other persons;" and section 679 of the Civil Code, which provides that "an authority conferred by law upon three or more persons may be exercised by a majority of them concurring, and an act directed by law to be done by three or more persons may be done by a majority of them concurring;" and that it is in conflict with the universal common-law rule on the subject; whilst, on the other hand, it is insisted for appellees that the power given them in section 3212 of the Kentucky Statutes, to make by-laws and rules necessary for the discharge of their duties and the government of their proceedings, authorized them to adopt the rule requiring the two-thirds vote to elect a clerk.

Mr. Dillon, in his work on *Municipal Corporations* (4th Ed., sec. 317), says:

"Since all the powers of a corporation are derived from the law, it is evident that no by-law or ordinance of a corporation can enlarge, diminish, or vary its powers. By-laws are in their nature strictly local and subordinate to general laws, and it is the policy of the law to require of them a strict observance of their powers, and they can not be exercised where it is not clearly appre-

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Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

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hended within the words of the act, or derived therefrom by necessary implication."

And in 17 Am. & Eng. Enc. Law, p. 236, it is said: "Ordinances passed by a municipal corporation under powers derived from its charter derive their authority from the legislative power of the State, and not merely from the municipal authority passing them. The Legislature of a State may delegate to a municipal corporation the power to make by-laws and ordinances, and, when so passed, they have the force and effect of the legislative act, within the limits prescribed for it."

The Board of Education is the creature of the Legislature, and can exercise no power not expressly or by necessary implication granted to it. Neither can it deprive itself, by its own actions, of the powers that are given it, and it can not enlarge or diminish them; and, whilst the Legislature could have provided that the Board of Education could enact a by-law to require the vote of two-thirds of its members to elect a clerk, or to exercise any other power conferred upon it by law, in the absence of such express or implied authority the majority of that body can not delegate its rights and powers to the minority, and, in the absence of statutory provision, the common-law rule, that the will of the majority shall be taken as the will of the whole, must prevail.

It was said by the Supreme Court of Maryland in the case of *Heiskell v. Mayor, etc.*, reported in 65 Md. 125, [57 Am. R., 308, and 4 Atl., 466], in commenting upon a contention of this sort, that "the Legislature having granted to this municipal corporation the right to settle their rules of procedure, this power included the right to fix the number necessary for a quorum and the transaction of business. 'Rules of pro-

Heyker v. McLaughlin, &c. Same v. Herbst, President, &c.

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cedure' are rules made by any legislative body as to the mode and manner of conducting the business of the body. They are intended for the orderly and proper disposition of the matters before it. Thus, what committees, and upon what subjects they shall be appointed, and what shall be the daily order in which the business shall be taken up, and in what order certain motions shall be received and acted upon, and many other kindred matters are subjects of the rules of procedure. . . . But these rules of procedure never contravene the statute or common law of the land. . . . As a general rule, the power that creates a municipal corporation fixes the number of members that shall constitute a quorum; and the 'quorum' of the body may be defined to be that number of the body which, assembled in their proper places, will enable them to transact their proper business, or, in other words, that number which makes the lawful body, and gives them the power to pass a law or ordinance. But when, in a case like the present, of a municipal corporation, the statute law creating it is silent as to what shall constitute a legal assembly, the law, both in England and in this country, is well settled that the majority of the members elect shall constitute the legal body."

Mr. Dillon, in his work on Municipal Corporations (4th Ed., sec. 278), says: "The common-law rules as to quorums and majorities, established with reference to corporate bodies, consisting of a definite number of corporators, have, in general, been applied to the common council, or selected governing bodies of our municipal corporations, where the matter is not regulated by a charter or statute."

It follows, therefore, in the absence of express authority in the articles of incorporation authorizing the Board

of Education to pass the by-law in question, that the common-law rule, that a majority thereof could legally act, is in full force; but we are of the opinion that the right, to pass the ordinance in question is in direct contravention with the provisions of the statute and Code, referred to above, which provide that an authority conferred by law upon three or more persons may be exercised by a majority of them concurring. (See *Hewitt, Auditor v. Craig*, 86 Ky., 23), [5 S. W., 280].

In our opinion, the general power conferred upon appellee to make by-laws and rules for the discharge of their duties and the government of their proceedings does not confer the power to enact a by-law requiring a two-thirds vote to elect an officer provided for by the charter, where the charter is silent as to the mode of this election. The rule was not necessary to carry into effect any power conferred by the charter to the body, and has a tendency to obstruct the performance of this important duty, and to take away from the majority the power conferred upon it, and vest it in the minority.

As appellant received a majority of the votes of the Board of Education at a meeting regularly called for the election of clerk, it was the duty of the president of the board to have declared him duly elected, and he is entitled to the office and the salary attached thereto. For reasons indicated the judgment appealed from is reversed, and the case remanded for proceedings consistent with this opinion.

**RESPONSE TO PETITION FOR REHEARING BY JUDGE BURNAM:**

It is insisted by appellee in his petition for rehearing [50 S. W., 859], in this case that he was elected to fill the office of clerk of the Board of Education for four years from January, 1896, and that there was, therefore, no vacancy in the office in January, 1898.

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Stix, &c., v. Eversole's Admr., &c.

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Whilst this suggestion was made in the original brief, it was not seriously insisted upon, and, in our opinion, is wholly unsupported by the agreed facts filed in the case, which show that appellee was elected clerk of the school board for the city of Covington for one year in January, 1893, and that in the December following he was again elected to this office for the term of four years, which term did not expire until December, 1898. It is true that in April, 1896, by action of the board, the term of the office of clerk was changed from four to two years, and it was expressly provided that this rule should apply to appellee, and that his term should begin January 1, 1896; and both under his original election and under the change made in April, 1896, it was provided that his term should expire on the 1st day of January, 1899. It seems to us that these facts are conclusive of appellee's contention on this point.

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CASE 59—ACTION ON ACCOUNT—APRIL 28.

## Stix, Etc. v. Eversole's Administrator, Etc.

## APPEAL FROM PERRY CIRCUIT COURT.

**PERSONAL REPRESENTATIVES—WAIVER OF DEMAND.**—A personal representative may waive the demand required by section 3872 of the Kentucky Statutes; and the filing by him of a general demurrer to the petition against him for a claim against his decedent is a waiver of such demand.

**E. B. HOGG, FOR APPELLANTS.**

1. The appellees laid no foundation for the motion for a rule to dismiss.
2. The court erred in making the rule absolute and dismissing the petition on the record alone.

Citations: Thomas v. Thomas, 15 B. M., 184; Nuttle v. Brannin, 5 Bush, 11.



JOHN C. EVERSOLE, FOR THE APPELLEES.

1. The court properly dismissed the petition for lack of the affidavit and demand required by the statute. Ky. Stats., secs. 3870-1; *Leach v. Kendall's Admr.*, 13 Bush, 424; *Trabue's Exrs. v. Harris*, 1 Met., 597. The statement in Hogg's deposition that the account was properly proven was insufficient; he does not show who the two witnesses were who proved the claim.
2. If the rule of plaintiff was improperly granted for lack of the affidavit, the defect was waived by failing to make objection at the time.

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

A personal representative may waive the demand required by section 3872, Kentucky Statutes, of claims against the decedent's estate (*Thomas v. Thomas*, 15 B. Mon., 184; *Howard v. Leavell*, 10 Bush, 481); and if he files a general demurrer to the petition it is then too late to object to the further prosecution of the action against him for want of such demand and proof (*Usher v. Flood*, 12 Ky. Law Rep., 721, [17 S. W., 132]). The trial court in the appeal before us dismissed the petition of the appellants upon the belief that there was not sufficient proof of a demand for the payment of the claim sued on, accompanied by the proper affidavit. But prior to the motion to dismiss for that reason the appellees had filed a general demurrer to the petition. The attention of the trial court seems not to have been called to this fact, or to the question of waiver now raised.

The judgment dismissing the petition is reversed, and cause remanded for proceedings not inconsistent with this opinion.

## CASE 60—INJUNCTION AGAINST TAXES—APRIL 28.

## Mossett, Etc. v. Newport and Cincinnati Bridge Co.

## APPEAL FROM CAMPBELL CIRCUIT COURT.

1. **TAXATION—POWER OF CAMPBELL COUNTY COURT TO APPOINT SUPERVISORS AT NEWPORT SESSION.**—Under the act of February 26, 1863, providing for holding sessions of the county court of Campbell county at Newport the county court so held could transact any business of which that court had jurisdiction except that no court of claims could be held at Newport. Accordingly the order of the county court held at Newport November 21, 1898, appointing supervisors was valid.
2. **SAME—NUMBER OF SUPERVISORS.**—The county of Campbell, containing a city of the second class and two cities of the fourth class, the county court properly appointed twelve supervisors under the provisions of section 4115 of the Kentucky Statutes.
3. **SAME—TIME OF THE MEETING OF THE BOARD OF SUPERVISORS.**—The provisions of section 4119, Ky. Stats., requiring the board of supervisors to convene at the county seat of their respective counties on the first Monday in January of each year is directory. If as a matter of fact they did on that day meet at another place, and proceed to discharge their duties as supervisors, such irregularity would not render any session held by them invalid.
4. **SAME—POWERS OF THE BOARD.**—Although secs. 4120, 4121, Ky. Stats., provide that the board of supervisors shall not continue in session for more than fifteen days, and might during this period increase or decrease any list if the evidence be clear and unmistakable that the valuation is not a fair cash value, yet the law does not forbid them upon reconvening to hear complaints from taking up any matter which may have escaped their attention during the first meeting. By sec. 4123 it is provided that the board in re-assembling shall hear all complaints and pass upon the assessment of all taxpayers, and for that purpose remain in session for not more than ten days. The action of the board in raising the assessment of appellee during its adjourned session was not therefore invalid.
5. **SAME—IRREGULARITY.**—By sec. 4128, Ky. Stats., no irregularity in the execution of the duties of the supervisors renders the

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Mossett, &c., v. Newport & Cincinnati Bridge Co.

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assessment invalid. Any aggrieved taxpayer may appeal to the judge of the county court within ten days after the final adjournment of the board and this remedy is exclusive.

**RAMSEY WASHINGTON FOR THE APPELLANTS.**

Counsel stated the points relied on by plaintiff below, the present appellee, as grounds for its injunction, as follows:

1. That the county court appointed the board of supervisors on November 21, 1898, at Newport, instead of appointing them on November 1, 1898, at the county seat, Alexandria.
2. The county court appointed a board consisting of twelve men, when it ought to have appointed only eight.
3. The board of supervisors never met at the county seat on January 1, 1899, but in Newport.
4. The board of supervisors did not increase the assessment of said bridge during the first fifteen days, but began the consideration of the increase at the adjourned meeting, though no clear or unmistakable evidence that said assessor's assessment of \$600,000 was not the fair cash value of said bridge, was offered or heard by them.

And thereupon discussed the points *seriatim* and made against the appellee's contention, citations as follows: Varney v. Justice, 86 Ky., 599; Smith v. Cansler, 83 Ky., 372; Rice v. Com., 3 Bush, 16; Justices of Jefferson County v. Clark, 1 Mon., 86; Rodman v. Harcourt, 4 B. Mon., 232; Wilson v. King, 3 Litt., 459; L. & N. R. R. Co. v. Trustees School Dist No. 37; 13 Ky. Law Rep., 638; Cooley's Const. Lim., p. 599; Ky. Stats., secs. 4115, 4128, 4121; Rennick v. Curry, 3 Ky. Law Rep., 156; Coldiron v. Ky. Lumber Co., 17 Ky. Law Rep., 598; High on Injunctions, sec. 31 (ed. 1874); Idem, sec. 356; Baldwin v. Shine, 84 Ky., 511; 20 Ky. Law Rep., 1195.

**C. J. AND W. W. HELM FOR THE APPELLEE.**

1. Orders appointing supervisors of tax must be made by the county court sitting at the county seat at the November term. Ky. Stats., secs. 4115, 1058, 1059, 1840, 1069; Ky. Con., secs. 64, 59, 141; Venhoff v. Morgan, 11 Ky. Law Rep., 276.
2. Local act providing for additional county courts at a place not the county seat, does not authorize county governmental business to be transacted there.
3. *De facto* officers may be enjoined from acting, though if they had acted, their acts as to the public or third persons, would have been valid. Williams v. Boynton, 147 N. Y., 426.
4. The statutes requiring supervisors of tax to meet at the county seat is mandatory, if they meet elsewhere their proceedings are void. Ky. Stats., secs. 4118, 4119.

Mossett, &c., v. Newport & Cincinnati Bridge Co.

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5. The board of supervisors can only increase or decrease assessments at their first meeting. The adjourned meeting is for the sole purpose of hearing complaints as to increases made by them at their first meeting. Ky. Stats., secs. 4120, 4121, 4122, 4123.

6. Injunction is the proper remedy in this case.

**SAME COUNSEL FOR THE APPELLEE IN A PETITION FOR A MODIFICATION OF THE OPINION.** (Petition not in the record.)

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

The Newport and Cincinnati Bridge Company seeks in this action to enjoin the Board of Supervisors for Campbell county from increasing the assessment of its bridge and approaches over the valuation placed thereon by the assessor. The grounds upon which it relies are that the orders appointing the defendants supervisors of taxes are void for the following reasons: First, because they were made at Newport on the third Monday in November, 1898, instead of at Alexandria, the county seat, on the first Monday in November; second, because the county court appointed twelve persons to act as supervisors, when, under the law, it had the power to appoint only eight; third, that the Board of Supervisors failed to meet at the county seat, Alexandria, on the first Monday in January, but, instead, met in Newport; fourth, that the Board of Supervisors did not increase the assessment of its property during the first fifteen days of its session, but only took up this question upon the reconvening of the board to hear complaints and pass upon the complaints of taxpayers.

We will consider these grounds in the order in which they are relied on.

While it is true that Alexandria is the county seat of Campbell county, the Legislature, by an act approved February 25, 1863, provided: "That in addition to the county court now held in the county of Campbell the pre-

siding judge of said court shall hold annually twelve terms of the Campbell County Court in the city of Newport. They shall be held at the court house on the third Monday of each and every month, and said judge may adjourn said court from day to day and from time to time if the business requires it; and he shall have power to call and hold special terms of said court in said city for such terms as the business may require; but no court of claims shall be held in Newport."

The third Monday in November, 1898, fell on the 21st; and the order of the county court appointing the Board of Supervisors was made at the county court held in Newport on that date. In our opinion, under the provisions of the act, *supra*, the county court sitting at Newport had the power to make any order or transact any business imposed upon it by law which it could have lawfully performed at Alexandria; the only restriction imposed by the act being that "no court of claims shall be held at Newport." The order of November 21, 1898, appointing the Board of Supervisors, made at the regular November term held in Newport, was a legal and valid one.

We are of the opinion that under section 4115, Kentucky Statutes, as the county of Campbell contains one second-class city and two fourth-class cities, the Board of Supervisors properly consisted of twelve persons. See Kentucky Statutes, section 4115.

Whilst under section 4119, Kentucky Statutes, it was the duty of the Board of Supervisors to convene at the county seat on the first Monday in January, yet we are of opinion that this provision is only directory, its purpose being simply to fix the time and place for the meeting of the board. If, as a matter of fact, they did on that day meet at another place, and proceed to discharge their duties as

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Mossett, &c., v. Newport & Cincinnati Bridge Co.

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supervisors, such irregularity would not render any assessment made by them invalid. See Kentucky Statutes, section 4128.

Though sections 4120 and 4121, Kentucky Statutes, provide that the Board of Supervisors shall not continue in session for more than fifteen days, and may during this period increase or decrease any list if the evidence be clear and unmistakable that the valuation is not a fair cash value, there is nothing in the law which forbids them, upon reconvening to hear complaints, from taking up any matter which may have escaped their attention during the first meeting.

Section 4123 expressly provides that "the board, in re-assembling, shall hear all complaints and pass upon the assessment of all taxpayers and for that purpose remain in session not more than ten days."

Section 4128 provides: "Any informality or irregularity in the execution of their duties as supervisors and any failure of duty on their part shall not render an assessment invalid. But any taxpayer, feeling himself aggrieved by the action of said Board of Supervisors, may appeal to the judge of the county court within ten days after the final adjournment of said board."

And this is the only remedy provided by law that an aggrieved taxpayer can avail himself of to avoid excessive valuation. See *Marion Co. v. Wilson*, 20 Ky. Law Rep., 1193, [49 S. W., 8].

For the reasons indicated, the judgment is reversed, and the cause remanded, with instructions to sustain the demurrer, and for other proceedings consistent with this opinion.

CASE 61—ACTION FOR INJURY CAUSING DEATH—APRIL 29.

## Morehead's Administratrix v. Bittner, Etc.

APPEAL FROM WARREN CIRCUIT COURT

1. ACTION UNDER SEC. 4, KY. STATS.—Under section 4 of the Kentucky Statutes an iron bar is a "deadly weapon."
2. SAME—REVIVOR.—An action under that section is not <sup>for</sup> an "assault" within the meaning of section 10. The gravamen of the action is the injury to the widow and children and the action may be revived by them after the defendant's death against his personal representatives.

LEWIS M'QUOWN, FOR APPELLANT.

1. There was no right of action at common law for intentional killing. Winnegar, admr., v. Cen. Pass. R. Co., 85 Ky., 551; Morgan v. Thompson, 82 Ky., 383.
2. Kentucky Statutes authorizing widow and children to recover damages for death of husband and father. Act. Mar. 10, 1856 (2 Rev. Stat., 509); sec. 2, ch. 1, Gen. Stat.; sec. 4, ch. 1, Ky. Stat.; ch. 31, 2 Rev. Stat., 429.
3. Construction of statutes—the rule of *ejusdem generis*. Kennedy v. Foster, 14 Bush, 482; Com. v. Kammerer, 11 Ky. Law Rep., 777; Brooks v. Cook, 44 Mich., 617; Moore v. Settle, 82 Ky., 187; Reg. v. Whitnosh, 7 B. & C., 596; City of St. Louis v. Laughlin, 49 Mo., 559.
4. Actions for assault or trespass *vi et armis* do not survive. Ky. Stat., sec. 10, ch. 1; Perkins v. Stein & Co., 94 Ky., 433; Moe v. Smiley, 125 Pa. St., 136; s. c. 17 Atl. Rep., 228; Hamilton v. Jones, 25 N. E. R., 192; Hegerich v. Keddle, 99 N. Y., 258; Ott v. Kaufman, 68 Md., 56; Russell v. Sunbury, 37 O. St., 37.
5. When trespass *vi et armis* lies. 1 Chitty's Pl., (11 Am. ed.) p. 167; Smith v. Hancock, 4 Bibb., 222.

JOHN B. GRIDER, FOR APPELLEES.

Counsel stated the propositions of law relied on by counsel for appellant for reversal as follows: first: the court erred in overruling the demurrer to the petition; second: the court erred in permitting the action to be revived. Counsel thereupon discussed the two propositions in their order and against the conclusions reached by counsel for appellant, made the following citations: Ky. Stats., secs. 410, 1242, 1166, 1308, 1313; Wil-

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Morehead's Admr., v. Bittner, &c.

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son v. Com., 3 Bush, 105; Com. v. Branham, 8 Bush, 387; Donahue v. Drexler, 82 Ky., 157; Philpot v. Com., 86 Ky., 595; Evans v. Com., 11 Ky. Law Rep., 551; Com. v. Duncan, 91 Ky., 592.

**B. F. PROCTOR, ALSO FOR THE APPELLEE.**

Counsel discussed the same questions urged by counsel for appellant and combatted by his associate counsel for appellee and made citations as follows: Donahue v. Drexler, 82 Ky., 187; Spring v. Glenn, 12 Bush, 172; Becker v. Crow, 7 Bush, 198; McLure v. Alexander, 15 Ky. Law Rep., 732; McLurg v. Ingelhart, 33 S. W. R., 80; Alexander v. Arnold, 79 Ky., 370.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

Appellees, who are the widow and children of Robert Bittner, brought suit against J. S. Morehead, alleging that he "wantonly and maliciously, and not in self-defense, assaulted, wounded, and struck and killed said Robert Bittner with a deadly weapon, a bar of iron, and from the effects of said wounding and striking said Bittner died," to the damage of appellees. A demurrer to the petition was overruled. Pending the litigation the defendant died. His widow qualified as administratrix, and a motion was made by appellees, and sustained, to revive the action against her as administratrix. A trial was had, resulting in a verdict for appellees, and the appellant has brought the case here for review.

No bill of exceptions was filed, but appellant's counsel relies upon two propositions of law:

First, that the demurrer to the petition should have been sustained, because an iron bar is not a deadly weapon, within the meaning of section 4 of the Kentucky Statutes.

Second, That the action did not survive against the administratrix of Morehead.

Upon the first question, counsel for appellant has submitted a most ingenious and plausible argument, upon the theory that at common law there was no right of action for an intentional killing; that the act of March 10, 1856,



(2 Revised Statutes, page 509, the original of Kentucky Statutes, section 4), prohibited the buying, selling, and dealing in the weapons popularly known as "colts," "brass knuckles," "slung shots," or any imitation or substitute therefor, and then gave such right of action by providing that "should any person be killed by the weapons aforesaid, or any one of them, or in any other way, except in self-defense," the wife and heirs at law should have a right of action against all concerned in such killing; that in the General Statutes (chapter 1, section 6) the language of the statute was altered by giving a right of action to the widow or minor children "of a person killed by the careless, wanton or malicious use of firearms, or by any weapon popularly known as colts, brass knuckles, slung shots, or other deadly weapon, not in self-defense," and this section of the General Statutes was subsequently amended by adding to the list of weapons the words "or sand bag, or any imitation or substitute therefor;" and that the history and phraseology of the statute, and the legislative construction given it, as evidenced by the additions made thereto, show that the rule of *ejusdem generis* should be applied in its construction, so as to make the words "or other deadly weapon" apply only to the weapons enumerated in the list, and to other weapons of like character, manufactured for use as weapons, and which could be carried concealed about the person. It is further urged that, if the meaning of the section is as contended for by appellees, and it gives a right of action for killing by *any* weapon whatever, the enactment and re-enactment of the dueling statute (1 Revised Statutes, page 429; General Statutes, c. 32; Kentucky Statutes, section 5) would have been entirely unnecessary. A number of cases are cited illustrating the application of the *ejusdem generis*

rule; special reliance being placed upon the construction given to the statutes against gaming in *Com. v. Kammerer* 11 Ky. Law Rep., 777, [13 S. W., 108], and *Moore v. Settle*, 82 Ky., 187 [56 Am. R., 889].

There is much force in the argument. But the original statute, after prohibiting, in the first section, the sale of the enumerated weapons, and, in the second, imposing a penalty against any person who should strike, beat, wound, or bruise another with any of the weapons named in the first section, proceeded, in the third section, to give a right of action, "should any person be killed by the weapons aforesaid, or any of them, *or in any other way*, except in self-defense." Some force should be given, if possible, to the words "or in any other way;" and this can hardly be done, if they are restricted to weapons of a similar character to those enumerated, or weapons of a similar character had already expressly been included in the statute, under the words "or any imitation or substitute therefor."

The language of the third section is much more comprehensive than that of the second, where a right of action is given to a person injured by any of the weapons named in the first section.

It may be further observed that, when the act of 1856 was carried into the General Statutes, neither section 2 nor section 3 was placed under the title of that act, viz: "To Prevent the Selling and Using of Certain Weapons;" but both sections were placed under the head of "Actions in Certain Cases Allowed;" section 2 of the act of 1856 becoming section 4 of chapter 1, and section 3 becoming section 6, with the addition of the word "fire-arms" to the list of weapons, and with the change of the words "or in any other way" to "or other deadly weapon."

The first section of the act of 1856 is not carried into the General Statutes. In the Kentucky Statutes we find the addition of the words "or sand bag, or any imitation or substitute therefor."

The statutes as to the carrying of concealed deadly weapons obviously refer to things made for use as such; for in those cases the gravamen of the offense consisted in the nature of the weapon, and its being carried concealed. To come within the inhibition of the statute, the weapon must be of the character denounced, independently of the use to which it is put. But where the gravamen consists in the use which is made of the weapon, and a penalty is imposed, or a right of action given, for injuries inflicted with a deadly weapon, the decisions in this State are not altogether in line with those of some of the other States, but the inquiry seems to be whether the weapon was deadly, in the sense that, as used, it was capable of causing death; and it has been generally held that, within such statutes, a weapon was deadly, provided it was capable of being used in the manner denounced by the statute.

Of course, where the statute imposes a penalty upon any one who shall "cut, thrust or stab another person with a knife, dirk, sword or other deadly weapon, without killing," etc., striking with a blacksmith's tongs is not an offense embraced therein, because the varieties of wounding embraced in the statute do not include such wounds as could be made by tongs. (Com. v. Hawkins, 11 Bush, 603, considering General Statutes c. 29, article 17, section 1.) And so it has been held that a club was not included under that statute.

But where, as in General Statutes c. 29, article 6, section 2 (Revised Statutes c. 28, article 6,

section 2), the language used was, "cut, strike or stab another with a knife, sword or other deadly weapon," it was held (in *Com. v. Branham*, 8 Bush, 387) that the words were not restricted to weapons or instruments made for the destruction of life or the infliction of injury, but embraced a chisel.

In *Wilson v. Com.*, 3 Bush, 105, in an opinion by Judge Robertson it was held that the language used included an ax; that the constructive rule, *ejusdem generis*, did not apply; and that the words "or other deadly weapon" were unrestricted, meaning "just what the words literally import."

In *Philpot v. Com.*, 86 Ky., 595, [6 S. W., 455], it was held, speaking of the words "cut, strike or stab:" "This language has reference, First, to any instrument which is capable of being used for the purpose of cutting, thrusting, or stabbing a person, and which may be dangerous to his life, if used by the assailant for that purpose; or, second, any instrument capable of being used for the purpose of striking a person, and which may be dangerous to his life, if used by the assailant for that purpose. There is no doubt that a sledge hammer falls within the second class."

In *Com. v. Duncan*, 91 Ky., 594, [16 S. W., 530], it was held, that under this statute a stone might be included under the words "strike . . . another with a . . . deadly weapon, with intention to kill," &c.; but that, in that case, the question whether the stone was of sufficient size to constitute it a deadly weapon, when used in the manner in which it was used, should have been left to the jury.

In *Evans v. Commonwealth*, 11 Ky. Law Rep., 551, [12 S. W., 767], it was held, in an opinion by Judge Lewis,

that a pitchfork was a deadly weapon, and that that question need not be left to the jury.

In view of this construction of similar language, in the light of which the section has been several times substantially re-enacted, we are constrained to the conclusion that this statute intended to embrace any killing done with a weapon either in itself deadly, or deadly when used in the manner in which it was used. The demurrer was, therefore, properly overruled.

The second objection is based upon the theory that the cause of action did not survive against the personal representative, because the statute does not authorize an action against any one save the wrongdoer himself, and, further, that it was, in substance, an action for an assault, and, therefore, died with Morehead, by virtue of section 10 of the Kentucky Statutes, providing that "actions for assault, slander, criminal conversation," etc., "shall cease or die with the person injuring or injured," and great stress is laid upon the fact that the averment of the cause of action contains every element of an assault; and cases from Pennsylvania, Indiana, and other States are cited, where it was held that like actions abated at the death of the wrongdoer.

We are unable to concur with the reasoning of these cases. The doctrine in this State is based upon a different theory. It is not that the wife or minor children recover damages for the assault upon the husband or father, but as said in *Donahue v. Drexler*, 82 Ky., 157 [56 Am. R., 889], through Chief Justice Hargis—a case where the husband, before his death, had made a settlement and accepted a compromise for the damages done to him—"this statute creates a new grievance, a new cause of action, in which neither the deceased nor his estate has

any interest, and for which his administrator could not sue. It is based upon the wrong to the wife and children, by depriving them of their natural support and protection which the law gives them in the husband and father. The injury is to them and their rights. They have the exclusive right of action, under the statute, and are entitled personally to the results of any judgment that may be recovered."

The statute, in our view, was not designed merely to impose punishment on the wrongdoer in addition to such punishment as might be imposed under the penal laws. It was primarily a statute providing compensation for a violation of the rights of the wife and children. This being so, and the action not being in any sense an action for assault, it follows that by virtue of the very terms of section 10, Kentucky Statutes, it survives against the personal representative of the wrongdoer.

For the reasons given, the judgment is affirmed.

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CASE 62—ACTION FOR RESCISSION—APRIL 29.

Lane, Etc. v. Lane, Etc.

APPEAL FROM PULASKI CIRCUIT COURT.

1. DEEDS—CONSTRUCTION.—A conveyance to A "and his heirs after him," "to have and to hold unto the party of the second part, his heirs and assigns forever" created a fee simple estate, the word "heirs" being a word of limitation and not of purchase.
2. RESCISSION—FAILURE OF CONSIDERATION.—A conveyance in consideration of the support of the wife of the grantor will be rescinded at the instance of the heirs of the grantor and the beneficiary after the death of the grantor for failure on the part of the grantee to comply with the agreement.
3. SAME—PARTIES.—In such an action the heirs of the grantor are proper parties.

**O. H. WADDLE FOR THE APPELLANTS.**

1. The deed from John L. Lane to D. F. Lane conveys only to D. F. Lane a life estate with the remainder to his children, and hence the deed of D. F. Lane to appellees conveys nothing to them except the life estate of D. F. Lane, and therefore upon the death of D. F. Lane his children became the absolute owners of the tract of land.
2. The plaintiffs were entitled to a rescission for failure of consideration—the grantee having failed to comply with the covenant which formed the consideration for the conveyance.

Citations: Genl. Stats., ch. 63, art. 1, sec. 10; Brann v. Elzey, 83 Ky., 440; Tucker v. Tucker, 78 Ky., 503.

**MAY & TRIMBLE FOR THE APPELLEES.**

1. The deed to Lane conveyed a fee simple—the word “heirs” being a word of limitation. Pritchard v. James, 93 Ky., 306; True v. Nicholls, 2 Duv., 547; Johnson v. Johnson, 2 Met., 331.
2. The appellants being the heirs of Daniel Lane, have no interest in this case if the deed was a fee simple conveyance.

**CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

One John L. Lane, in 1889, conveyed to Daniel Lane a tract of land of some one hundred and thirty acres, in Pulaski county, and this land Daniel and his wife, Polly, in 1893, conveyed to two of their sons, T. F. and A. J. Lane, in consideration solely that these two sons would maintain and support their mother, Polly, during her natural life. Shortly thereafter Daniel died, and this suit was brought by Polly, and the children of Daniel other than T. F. and A. J. Lane, against the latter, to set aside the deed of 1893, on the ground—First, that Daniel had only a life estate in the land, with remainder to all the children of Daniel and Polly; and, second, that T. F. and A. J. Lane had failed and refused to maintain and support the mother, Polly, as required in the deed. The chancellor held the petition bad on demurrer.

As to the first ground of relief in the petition, we entertain no doubt of the correctness of the judgment below.

The conveyance from John L. to Daniel Lane was in fee simple.

The parties to the deed are stated to be "John L. Lane, of the county of Pulaski and State of Kentucky, party of the first part, and Daniel Lane and his heirs after him, party of the second part." And the grantor "does hereby sell and convey to the party of the second part, his heirs and assigns, the following property," etc., "to have and to hold unto the party of the second part, his heirs and assigns, forever."

We regard the word "heirs," in the clause where it first occurs, as a word of limitation merely, denoting the inheritable quality of the estate conveyed, and not the particular persons who were to take the estate. This is the usual meaning of the word, and it is confessed of its meaning in the remaining clause where it occurs.

The second ground relied on for setting aside the deed presents a more troublesome question.

Clearly, if the entire consideration for the conveyance has failed, the chancellor ought to rescind the contract, and put the parties in *statu quo*. Under the averments of the petition, the mother is being supported and maintained by her other children because of the failure and refusal of the defendants to maintain and support her. She is entitled to a rescission of the contract, if what she says be true, and, as the other children who are plaintiffs with her would be interested in the land if the deed is set aside, they are proper parties to the suit. In the respect indicated, the petition, we think, states a good cause of action. Reversed, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.



## CASE 63—INJUNCTION AGAINST MUNICIPAL TAXATION.

## Hughes v. Carl, Etc.

## APPEAL FROM PULASKI CIRCUIT COURT.

**MUNICIPAL CORPORATIONS—TAXATION.**—Since the adoption of the new Constitution all property within the territorial limits of a municipal corporation is subject to taxation regardless of the question of benefits, actual or presumed.

**O. H. WADDLE FOR APPELLANT.** (J. P. HORNIDAY OF COUNSEL).

The case of Board of Councilmen of the City of Frankfort v. Scott, 19 Ky. Law Rep., 1068, is conclusive of this case.

**G. W. SHADOAN FOR APPELLEES.**

The taxation of appellee's property is illegal because they derive no benefit from the city government. Constitution, sec. 242; old Constitution, sec. 14, art. 13; 15 B. M., 498; 87 Ky., 267; 321; 92 Ky., 342; 10 Ky. Law Rep., 146, 185; 16 Ky. Law Rep., 172; 13 Ky. Law Rep., 603.

**CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

The judgment below perpetuates an injunction granted on behalf of appellees, property owners in the outer limits of the city of Somerset, for the reason, that, whilst their property is situated within the boundary lines of the city, they do not receive a corresponding benefit from the taxation sought to be enforced by the city authorities. In this judgment the chancellor followed the rule under the old Constitution as repeatedly announced by this court, and, while no change of this ruling growing out of the new Constitution had been announced by this court when this case was heard below, it has been authoritatively determined by this court recently that the provisions of the new Constitution requiring that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax, and prohibiting the ex-

emption from taxation of any property except such as is exempted by the Constitution, preclude the application of the old rule relieving the outlying property from taxation when it is in fact situated within the territorial limits of the city. (*Board of Councilmen of Frankfort v. Scott*, 19 Ky. Law Rep., 1068, [42 S. W., 104].)

It is true that the usual reason given for the prevalence of the old rule was that to tax for city purposes those living in the remote parts of the city whose lands had not been laid off into city lots, or used as city property, and who had scant, if any, police protection, would amount to a taking of private property for public use without just compensation, and, therefore, a violation of section 14, article 13, of the old Constitution; and it is likewise true that the present Constitution, no more than the old, permits this to be done. It would seem, therefore, to follow that, if the old rule was ever supported by a good reason, there would be the same reason for its application under the new as there was under the old Constitution. But the old rule was never satisfactory, because impracticable. It seemed, in principle, to suggest a comparative basis for the taxation of property within the city, levying the greater tax on those more favorably located, and graduating the taxes of each taxpayer according to the benefits received. There was constant friction under the old system, and the courts were rarely without cases involving the question of taxation of outlying property. There are many reasons why such cases were rapidly multiplying, rather than diminishing, under the old rule.

When, therefore, the provisions of the new Constitution seemed to demand absolute uniformity of taxation within the territorial limits of the tax-

ing authority, the courts seized the opportunity of changing the rule. And, moreover, the rule announced in the Scott case is entirely just. It does not violate the principle that generally those getting the greatest benefit from the city government should pay the greatest tax. It is easy to see that, the fewer benefits received by any given property, the less will be its value, and the less, therefore, will it be taxed. The judgment must be reversed for proceedings consistent herewith.

CASE 64—ACTION FOR INJURY CAUSING DEATH—APRIL 29.

### Louisville & Nashville Railroad Co. v. Taaffe's Administrator.

106	535
131	601
135	294
106	535
132	457

#### APPEAL FROM GALLATIN CIRCUIT COURT.

1. INSTRUCTIONS PEREMPTORY—CONFLICTING EVIDENCE.—The proof as to the circumstances and conditions under which the decedent lost his life being conflicting it was proper for the court to refuse the peremptory instruction asked for by defendant, and in refusing to enter judgment for the defendant notwithstanding the verdict.
2. EVIDENCE—NUMBER OF DECEDENT'S FAMILY.—In an action to recover damages for an injury resulting in the death of intestate, it was error to permit evidence to go to the jury of the number of the decedent's family; but such evidence can not in this case be held to be prejudicial.
3. INSTRUCTIONS.—The appellant can not complain of the failure of the court to give instructions asked by it when the principles embodied in those instructions were covered by those given by the court.
4. DAMAGES—MEASURE OF.—In an action for damages for negligence resulting in death, the measure of damages is the power of the decedent to earn money and no other element can be considered except in case of gross and wilful negligence.
5. INSTRUCTIONS—MUTUAL DUTIES OF PARTIES WITH REFERENCE TO USE OF RAILROAD TRACK WITHIN A TOWN.—It is the duty of those in charge of a railroad train when

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Louisville & Nashville Railroad Co. v. Taaffe's Admr.

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approaching the station to use reasonable and ordinary care to discover any obstruction upon the track and it is their duty also to give timely notice of its approach to the station. They have a right, however, to presume that any person standing or walking upon the track of a railroad will in due time remove himself out of danger or injury and until they discover that such a person, even a trespasser, is oblivious of the danger, they are not required to stop or check the speed of the train. It was the duty of decedent if he had notice of the approach of the train to the station to exercise reasonable care to ascertain the proximity of the train to the station and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching; and it was his duty if he heard the train whistle, indicating its approach to the station, to be on the look-out for the same and to keep himself out of danger. These principles should be embodied in the instructions given to the jury in an action to recover damages for negligence resulting in the death of the plaintiff's decedent.

**B. D. WARFIELD FOR THE APPELLANT. (R. B. BROWN AND H. W. BRUCE OF COUNSEL.)**

The trial court erred to the prejudice of the substantial rights of the appellant in the following particulars:

1. In overruling the demurrer to the petition.
2. In not carrying the demurrer to the reply back to the petition and sustaining it to the petition.
3. In overruling the appellant's motion for a judgment notwithstanding the verdict.
4. In permitting incompetent testimony to be given in evidence before the jury as to the family and children deceased left, and as to the use of appellant's tracks by persons in crossing from one side of its railroad to the other—not at any station or public crossing.
5. In overruling appellant's motion for a peremptory instruction made at the close of plaintiff's evidence.
6. In overruling appellant's motion for a peremptory instruction made at the close of all of the evidence.
7. In refusing to give instructions A. B. C. D. E. and F. and each of them asked by appellant.
8. In giving, of its own motion, instructions marked 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, and each of them.
9. And for the further reason that the verdict is wholly contrary to the evidence and is not supported by any or by sufficient evidence, and because it is contrary to law, and contrary to the law and the evidence.

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Louisville & Nashville Railroad Co. v. Taaffe's Admr.

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Citations: Kent's Admr. v. Deposit Bank, 91 Ky., 70; Embry v. L. & N. R. R. Co., 36 S. W. R., 1123; Willé v. Sweeney, 2 Duv., 161; Young v. Duhme, 4 Met., 239; Martin v. McDonald, 14 B. M., 437; Mitchell v. Vance, 5 Mon., 528; Birney v. Hann, 3 A. K. M., 322; Macklin v. Trustees, &c., 88 Ky., 598; Mitchell v. Mattingly, 1 Met., 239; Bogenschutz v. Smith, 84 Ky., 330; Drake v. Semonin, 82 Ky., 291; 3 Sutherland on Damages, 282; Pierce on Law of Railroads, 393; L. C. & L. R. Co. v. Case's Admr., 9 Bush, 736; Muldraugh's Hill C. & C. T. P. Co. v. Maupin, 79 Ky., 105; L. & N. R. R. Co. v. Kelly's Admr., 19 Ky. Law Rep., 69; Standard Oil Co. v. Tierney, 92 Ky., 377; Reems v. Chicago. &c., R. R. Co., 26 Iowa, 363; Patterson, Railway Accident Law, sec. 372; P. R. v. Powers, 74 Ill., 343; Stevens v. Hannibal, &c., R. Co., 9 S. W. R., 591; Cty of Chicago v. Brennan, 65 Ill., 163; 1 Sedgw. Measure of Damages, 641 and notes; Thompson on Negligence, vol. 2, p. 1263; P. R. Co. v. Roymlon, 2 U. S., 460; Lingenfelter v. L. & N. R. R. Co., 9 Ky. Law Rep., 116; Frances' Admr. v. L. & N. R. R. Co., 15 Ky. Law Rep., 244; L. & N. R. R. Co. v. Krey, 16 Ky. Law Rep., 797; Hoskins' Admr. v. L. & N. R. R. Co., 17 Ky. Law Rep., 78; Brown's Admr. v. L. & N. R. R. Co., 97 Ky., 228; Gherkins' Admr. v. L. & N. R. R. Co., 17 Ky. Law Rep., 201; M. & O. R. Co. v. Stroud, 31 A. & E. R. Cases, 443; Bell v. H. & St. J. R. Co., 4 Am. & Eng. R. Cases, 580; Nichols, Admr., v. L. & N. R. R. Co., 9 Ky. Law Rep., 702; O., &c., R. Co. v. Walker, 12 Am. & Eng. R. Cases, 121; L., &c., R. Co. v. Smith, 19 Am. & Eng. R. Cases, 21; Shackelford's Admr. v. L. & N. R. R. Co., 84 Ky., 43; L. & N. R. R. Co. v. Howard's Admr., 6 Ky. Law Rep., 163; John's Admr. v. L. & N. R. R. Co., 10 Ky. Law Rep., 757; K. C. R. Co. v. Gastineau's Admr., 83 Ky., 121; Brown's Admr. v. L. & N. R. R. Co., 97 Ky., 228; Eastern Ky. R. Co. v. Powell, 17 Ky. Law Rep., 1051; Helm v. L. & N. R. R. Co., 17 Ky. Law Rep., 1004; L. & N. R. R. Co. v. Wade, 36 S. W. R., 1125; McDermott v. K. C. Ry. Co., 93 Ky., 408; Smith v. L. & N. R. R. Co., 16 Ky. Law Rep., 887; Vertrees, Admr., v. N. N. & M. V. Co., 95 Ky., 316; Ill. Cent. R. R. Co. v. Dick, 91 Ky., 434; Johnson's Admr. v. L. & N. R. R. Co., 91 Ky., 651; N. N. & M. V. R. R. Co. v. Deuser, 97 Ky., 92; Greshem's Admr. v. L. & N. R. R. Co., 15 Ky. Law Rep., 599; T. H., &c., R. Co. v. Graham, 12 Am. & Eng. R. R. Cases, 77; Gregory v. R. R. Co., 31 Am. & Eng. R. R. Cases, 440; McAllister v. B., &c., R. R. Co., 19 Am. & Eng. R. R. Cases, 108; Scheffler v. M., &c., R. R. Co., 19 Am. & Eng. R. R. Cases, 173; L. & N. R. R. Co. v. Black, 45 Am. & Eng. R. R. Cases, 38; Bell v. R. R. Co., 4 Am. & Eng. R. R. Cases, 580; Henry v. R. R. Co., 12 Am. & Eng. R.

## Louisville &amp; Nashville Railroad Co. v. Taaffe's Admr.

R. Cases, 136; Barker v. H., &c., R. Co., 37 Am. & Eng. R. R. Cases, 292; Spicer v. C. & O. R. R. Co., 45 Am. & Eng. R. R. Cases, 28; Rine v. C. & A. R. Co., 25 Am. & Eng. R. R. Cases, 545; Wabash R. Co. v. Jones, 45 N. W. R., 50; L. & N. R. R. Co. v. St. P. & D. Ry. Co., 76 Fed. Rep., 201; Webster's Dict., "Damages"; Fay v. Parker, 53 N. H., 342; 5 Am. & Eng. Ency. of Law, 23, title "Corporations"; L. S. & M. S. R. R. Co. v. Prentice, 147 U. S., 101; Houston, &c., R. R. Co. v. Cowser, 57 Texas, 293; McAdory v. L. & N. R. R. Co., 10 Southern Rep., 507; James v. R. & D. R. Co., 9 Southern Rep., 335; L. & N. R. R. Co. v. Trammell, 9 Southern Rep., 870; Rose v. Des Moines, &c., R. Co., 39 Iowa, 355; Chicago, &c., R. Co. v. Bayfield, 37 Mich., 205; Telfer v. Northern R. Co., 1 Vroom, 188 (30 N. J. Rep.); St. Louis, &c., R. Co. v. Farr, 56 Fed Rep., 994; St. L., &c., R. Co. v. Robbins, 20 S. W. R., 886; 3 Elliott on Railroads, sec. 1152 and cases cited.

EDWARD W. HINES ALSO FOR APPELLANT. (H. W. BRUCE AND B. D. WARFIELD OF COUNSEL.)

1. Running a train at unusual speed is not negligence as to a trespasser. Shackelford's Admr. v. L. & N. R. R. Co., 84 Ky., 43.
  2. If the servants in charge of the train had seen plaintiff's intestate they would have had the right to assume that he would leave the track without further signal, the train being due and a signal of its approach having been given. France's Admr. v. L. & N. R. R. Co., 15 Ky. Law Rep., 244; Nichol's Admr. v. L. & N. R. R. Co., 9 Ky. Law Rep., 702.
  3. The contributory negligence of plaintiff's intestate in remaining on the track after a signal of the train's approach had been given without taking any precaution as to his safety entitled defendant to a peremptory instruction. L. & N. R. R. Co. v. Kelly's Admr., 14 Ky. Law Rep., 734; Smith v. L. & N. R. R. Co., 16 Ky. Law Rep., 887; Rupard, &c., v. C. & O. Ry. Co., 83 Ky., 280; Ill. Cent. R. Co. v. Dick, 91 Ky., 434.
  4. The instructions were erroneous in requiring defendant's servants to keep a look-out. (See citations in original brief.)
  5. The court erred in failing to give the jury any measure of damages. L. & N. R. R. Co. v. Eakin's Admr., 45 S. W. R., 529; Ches. & O. Ry. Co. v. Lang's Admr., 19 Ky. Law Rep., 65; L. & N. R. R. Co. v. Kelly's Admr., 19 Ky. Law Rep., 69.
- J. S. GAUNT, THOMAS W. BULLITT, W. S. PRYOR, M. L. DOWNS, CHARLES H. SHEILD, AND WM. MARSHALL BULLITT FOR APPELLEE.

1. It is the duty of a railroad company to keep a look-out as a train runs at the rate of fifty miles an hour into a regular passen-

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Louisville & Nashville Railroad Co. v. Taaffe's Admr.

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ger station where it is to stop, in a town of three hundred or four hundred people. L. & N. R. R. Co. v. Vittitoe, 19 Ky. Law Rep., 612; L. & N. R. R. Co. v. Howard, 82 Ky., 212; Shelby v. R. R. Co., 85 Ky., 224; Conley v. Cincinnati, &c., R. R. Co., 89 Ky., 402; L. & N. R. R. Co. v. Potts, 92 Ky., 30; C. & O. Ry. Co. v. Perkins, (Sept., 1898); 3 Elliott on Railroads, sec. 1856 *et seq.*; 8 Am. & Eng. Ency. of Law (2d ed.), 390; 16 Same, 412, 414; 19 Same, 934; 23 Same, 132-135.

2. The measure of damages for a death by negligence is compensation for the injury done, as determined by the "power of the decedent to earn money." L. & N. R. R. Co. v. Berry, 96 Ky., 604; L. & N. R. R. Co. v. Ward, 19 Ky. Law Rep., 1900.
3. The petition is proper in form.

**B. D. WARFIELD FILED A BRIEF FOR APPELLANT IN RESPONSE TO THE BRIEF IN BEHALF OF THE APPELLEE.**

**EDWARD W. HINES FOR APPELLANT IN A PETITION FOR A MODIFICATION OF THE OPINION. (B. D. WARFIELD OF COUNSEL.)**

Citations as follows: Nichol's Admr. v. L. & N. R. R. Co., 9 Ky. Law Rep., 702; France's Admr. v. L. & N. R. R. Co., 15 Ky. Law Rep., 244; L. & N. R. R. Co. v. Survant, &c., 19 Ky. Law Rep., 1576; Rupard, &c., v. C. & O. Ry. Co., 88 Ky., 280.

**JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.**

It is alleged in the petition that the decedent, Taafe, was killed by and through the gross and willful carelessness and mismanagement of the servants and agents and employes in control of the appellant's train, and that said train was willfully, negligently, carelessly, and recklessly run against the said Taafe with great force and violence, wounding, bruising, crushing, and mangling him, from the effects of which he then and there died, for which plaintiff claimed damages in the sum of \$25,000.

The first paragraph of the answer is a denial of negligence, carelessness, or recklessness on the part of the defendant, etc. The second paragraph is a plea of contributory negligence. The third paragraph avers that the plaintiff's intestate so contributed to the injury by stepping upon or so near defendant's track, in full view and

hearing of one of its approaching trains, and that said train was so close to said Taafe that it was impossible by the exercise of ordinary care by those engaged in operating the train to check or stop its progress in time to prevent said injury, that, but for such contributory negligence on the part of the decedent, the injury would not have happened.

The reply is a traverse of the answer. A jury trial resulted in a verdict for the sum of \$5,000 in favor of plaintiff. Thereupon the defendant moved the court to render judgment for it, notwithstanding the verdict, which motion was overruled, and judgment rendered on the verdict.

Thereafter the defendant filed a motion for a new trial upon the following grounds, in substance: (1) The verdict is not sustained by sufficient evidence, and is contrary to law. (2) The verdict is contrary to law. (3) The verdict is contrary to law and the evidence. (4) Damages are excessive, appearing to have been given under the influence of passion and prejudice. (5) Error of the court in overruling defendant's motion for peremptory instruction to the jury to find for plaintiff. (6) Error of the court in overruling defendant's motion for a peremptory instruction at the close of all the testimony. (7) Error of the court in permitting plaintiff, over defendant's objection, to prove the number of the family of deceased. (8) Error of the court in permitting the plaintiff to prove that defendant's track was used by persons to walk upon and across at or near the point where deceased was killed. (9) Because the court erred in refusing to give instructions A, B, C, D, E, and F asked by defendant. (10) Because the court erred in giving instructions designated and marked 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, given by the court on its own motion.



It appears from the testimony in this case that the plaintiff's intestate was killed by being struck by defendant's train of cars in Sparta, not far from the railroad station. The proof in the record as to the circumstances and conditions under which decedent lost his life is conflicting, and, that being the case, there was no error of the court in refusing the peremptory instruction asked for by the defendant, nor in overruling defendant's motion for a judgment notwithstanding the verdict.

The testimony as to the family left by decedent was incompetent, and should not have been permitted; but we are unable to see that it was prejudicial to the substantial rights of the defendant, and especially so as it was held in the case of *L. & N. Railroad Co. v. Kelly's Adm'r* [38 S. W., 852], that the widow and children of deceased had a right to be present in court; and, from the brief of appellant, it seems that the widow and children in this case were present in court.

It seems to us that so much of the instructions asked by defendant as correctly presented the law applicable to the case were embodied in the instructions given by the court, and we are not disposed to hold that the court erred in refusing the instructions asked by defendant.

Instruction No. 3 as given by the court seems to authorize the jury to find damages in excess of the power of deceased to earn money, and to that extent may be considered in conflict with the decisions of this court which hold that the criterion of recovery is for the destruction of the power of the decedent to earn money, and that no other element of damages can be considered except in case of gross or willful negligence (the writer of this opinion, however, dissented from the decisions on that question); but the decisions are now the law. Hence it follows that

the instruction in question was erroneous, and doubtless prejudicial to the defendant.

It was the duty of the defendant when approaching the station in the town of Sparta to use reasonable or ordinary care to discover any obstruction upon the track, and it was also the duty of the defendant to give timely and proper notice of its approach to the station. But it also had a right to presume that any person standing or walking upon the track of the railroad would in due time remove himself out of danger of injury, and that, until defendant's agents or servants discovered that such person—even a trespasser—was oblivious of the danger, it was not required to stop or check the speed of the train. It was also the duty of the decedent, if he had notice of the approach of the train to the station, to exercise reasonable care to ascertain the proximity of the train to the station, and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching; and it was his duty, if he heard the train whistle, indicating its approach to the station, to be on the lookout for the same, and to keep himself out of danger. We are not sure that the instructions given sufficiently include or embrace this principle.

It seems to us that the instructions of the court failed to correctly present the law as indicated herein, and for that reason the judgment is reversed, and cause remanded for a new trial upon principles consistent with this opinion.

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Ryan v. Caldwell.

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CASE 65—ACTION ON PROMISSORY NOTE—MAY 2.

## Ryan v. Caldwell.

APPEAL FROM LOGAN CIRCUIT COURT.

**LIMITATIONS—SURETIES.**—Where a note payable five years from date with interest payable at stated intervals contained the stipulation that should as much as two installments of interest at any time be due and unpaid, then and in that event the whole should be and become due, a cause of action accrued when two installments of interest had fallen due and limitation then began to run in favor of the surety on said note and the cause of action was barred in seven years from that time.

**JAMES H. BOWDEN** FOR THE APPELLANT. (W. S. PRYOR OF COUNSEL.)

The cause of action accrued by the very terms of the contract when the maker of the note was in default in the payment of two instalments. *Bank v. Peck*, 8 Kansas, 660; *Schooley v. Romain*, 31 Md., 574; *Mobray v. Lackie*, 42 Md., 474; *Dean v. Nelson*, 10 Wall., 158 (L. ed. Book 19, p. 926); *Parks' Exr. v. Cooke*, 3 Bush, 168; *Bishop v. Lawrence*, 8 Ky. Law Rep., 645.

**W. S. PRYOR** ALSO FOR APPELLANT. (S. R. CREWDSON OF COUNSEL.)

The surety stands upon the letter of his obligation and the clause inserted in the note for the benefit of the payee enures likewise to the benefit of the surety. *National Bank v. Peck*, 8 Kan., 662; *Wheeler & Wilson Mfg. Co. v. Howard*, 28 Fed. Rep., 741.

**S. R. CREWDSON** ALSO FOR THE APPELLANT.

The language of the precipitatio clause in the note is mandatory and not permissive merely. Nebraska authorities cited by counsel for appellee are not authority here because in those cases the rights of a surety were not involved.

**SELDEN Y. TRIMBLE** FOR THE APPELLEE. (BROWDER & BROWDER OF COUNSEL.)

Default in the payment of interest does not of itself cause the principal obligation under a stipulation like that in the note sued on herein to mature so as to start the statute of limitation. *Richardson v. Warner*, 28 Fed. Rep., 343; *Lowenstein*

Ryan v. Caldwell.

v. Phelan, 17 Neb., 429; Nebraska National Bank v. Nebraska City Hydraulic Gas Light & Coke Co., 4 McCrary (U. S.), 320; s. c. 14 Fed. Rep., 763; Radford v. Southern Mutual Life Ins. Co., 12 Bush, 434; 13 Am. & Eng. Ency. of Law, 725.

S. Y. TRIMBLE AND BROWDER & BROWDER IN AN ADDITIONAL BRIEF FOR THE APPELLEE.

The precipitation clause in the note was inserted for the benefit of the payee and he might waive it at his option. Richardson v. Warner, 28 Fed. Rep., 343; Nebraska City Nat. Bk. v. Nebraska City Gas, &c., Co., 4 McCrary (U. S.), 320; 14 Fed. Rep., 763; Radford v. Southern Mutual Life Ins. Co., 12 Bush, 434; 13 Am. & Eng. Ency. of Law, 725.

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The general principle is well settled that a surety is bound only by the letter of his contract of suretyship. When, therefore, a promissory note is due in five years from its date, and there is a further provision that the interest is to be paid at stated times, and "should as much as two installments of interest, at any time, be due and unpaid, then, and in that event, the whole shall be and become due," the contract as to the surety on the note is to be construed as maturing, and the note treated as due whenever as many as two installments of interest shall become due and remain unpaid. This is the plain import of the language quoted and found in the note in controversy on this appeal; and, giving to it its plain meaning, the payee's cause of action against the surety accrued on the default of the payments of interest as stipulated, and seven years after the cause of action accrued the statutory bar of limitations was complete. We think this view of the contract accords with reason and is supported by the weight of authority.

Mr. Justice Brewer, when on the Supreme Bench in Kansas, so held in National Bank v. Peck, 8 Kan., 662, saying for the court, in a case where three notes secured by a mort-

gage, and due in six, twelve, and eighteen months, were, according to the mortgage, all to become due if the payor failed to pay the first note, as follows: "This clause is inserted in mortgages usually for the benefit of the mortgagee, but being a valid stipulation, the mortgagor has equal right to insist upon it, and receive whatever advantage he can from its enforcement. When the payor failed to pay, at the end of six months, the note then due, by the terms of the contract, all three became due. The statute of limitations began to run on all, and a subsequent purchaser purchased after maturity." See, also, *Wheeler & Wilson Manufacturing Co. v. Howard*, 28 Fed. Rep., 741; *Hemp v. Garland*, 4 Q. B., 519; *Hunt v. Roberts*, 45 N. Y., 691.

In *Parks' Ex'r v. Cooke*, 3 Bush, 168, this court held that a stipulation to the effect that, "should the interest be suffered to remain unpaid for thirty days after the same shall become due and payable, then the whole debt, with interest accrued, shall be due and payable as if the full time had expired," gave a right of action to the holder of the note upon the default indicated; and where the holder was the assignee of the payee of the note, and failed to exercise the right to sue, he lost his recourse on the payee, who was his assignor.

This case tends strongly to support the views we have expressed.

The Supreme Court of Nebraska has adopted a different construction of such a contract, but we regard it as a safe rule to take the writing at what it says; certainly so, when we come to measure the surety's undertaking.

As aptly said by counsel: "It is easy to conceive that a surety might require such a clause as a condition for his own protection. He might be unwilling to bind

Barbour's Admr. v. Larue's Assignee, &c.

himself for five years unconditionally, whereby he might be compelled to pay, at the end of that time, both the principal and interest, and might very prudently say: 'Insert a clause which requires the interest to be paid quarterly, and which provides that, if not so paid, the debt is to become due, so that, if not paid, I will have the right to pay it or secure myself,' etc.

We think the plea of limitations is sufficient, and, the judgment below not being in accord with this view, the same is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

CASE 66—ASSIGNMENT OF INSURANCE POLICY—MAY 4.

Barbour's Administrator v. Larue's Assignee,  
Etc.

APPEAL FROM LARUE CIRCUIT COURT.

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—INSURANCE POLICY.—Until a policy of insurance has been carried to a point where under the terms of the policy itself it has a value, it does not pass to an assignee for the benefit of creditors under a general clause embracing "any property, accounts or claims not herein mentioned."
2. INSURANCE POLICIES—ASSIGNMENT—INSURABLE INTEREST.—The assignment of an insurance policy as indemnity to a surety is valid only to the extent such surety may pay the assignor's debt.

D. H. SMITH FOR THE APPELLANTS.

1. The interest of Larue in the policies of life insurance did not pass to the assignee under the deed of assignment.
2. The assignee is estopped by his conduct to claim the benefit of the policies.

Citations: 1 Biddle on Ins., 183, 271, 281; May on Ins., vol. 1, secs. 102, 175, 189, 440; 2 Story Eq., secs. 1538, 1539, 1542; 2 May on Ins., secs. 385, 391, 596; Bishop on Insolvent Debtors; Cook on Life Ins., sec. 77; Bigelow on Estoppel, 59, 60, 61, 62.

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Barbour's Admr. v. Larue's Assignee, &c.

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476, 478, 487, 496, 498, 500, 501, 510, 524, 530, 540, 556, 578; Herman on Estoppel, 476; 6 Cush., 286; 49 Hun., 192-3; 16 Ky. Law Rep., 398, 286; 17 Ky. Law Rep., 313, 657; 95 Ky., 464; 93 Ky., 358; 89 Ky., 110; 86 Ky., 223; 81 Ky., 368, 375; 3 Litt., 56, 351; 14 Bush, 193; 5 J. J. Mar., 566; 4 Met., 352; 3 Bush, 361, 490, 702; 6 B. M. 113; 8 Bush, 646; 17 N. Y., 580; 28 Barb., 333; 2 Hill, 275; 37 Barb., 184; 4 Sandf., Ch., 498; 7 Daly, 52; 19 Fla., 448; 7 East., 335; 27 Barb., 395; 9 Bing., 332; 8 Mass., 515; 101 Mass., 565; 152 Mass., 343; 104 U. S. Rept., 777; 41 Ind. Rept., 116; 36 Kan., 146; 15 Fed. Rep., 536; 15 L. R. Eq., 26; 13 L. R. Eq., 158, 188; 13 L. R. App. Cas., 570; 10 Irish Repts. (Eq.), 117.

**E. E. MCKAY ON SAME SIDE.**

This court has heretofore held in this case that before the assignee can recover the amount in these policies he must show:

1. That Larue intended the policies for his creditors.
2. That they had a surrender value.
3. That the policies were a basis of credit.
4. That the policies were made payable to his creditors as alleged in the petition, and
5. That Larue paid the premiums.

The assignee has wholly failed to show these points.

Citations: Larue v. Larue, 96 Ky., 326; Dushane v. Beall, 161 U. S., 514.

**I. W. TWYMAN AND J. P. HOBSON FOR APPELLEES.**

1. Absolute assignment of life insurance policies to one without interest or beyond interest is void. Basye v. Adams, 81 Ky., 368; Settle v. Hill, 5 Ky. Law Rep., 691; Weigelman v. Bronger, 16 Ky. Law Rep., 400; Coudell v. Woodward, 16 Ky. Law Rep., 742; Equitable Ins. Co. v. Hazelwood, 16 Am. St. Rep., 906.
2. Non-payment of notes for balance of cash first payment recited in policies did not avoid them. Griffith v. N. Y. Life Ins. Co., 101 Cal., 627; s. c. 40 Am. St. Rep., 96; Brooklyn Life Ins. Co. v. Miller, 12 Wall., 285; Krause v. Equitable Life Assn., 99 Mich., 461; Wytheville Ins. Co. v. Seiger, 90 Va., 277.
3. Assignee can not consent to spoliation of trust estate. Burrill on Assignments, secs. 238, 241, 352; Cox v. Osborne, 1 Mar., 311; Ormsby v. Tarascon, 3 Litt., 410; Briggs v. Davis, 75 Am. Dec., 363; Ingram v. Kirkpatrick, 51 Am. Dec., 428; McIlhinney v. Todd, 10 Am. St. Rep., 753; Gibson v. Chedick, 90 Am. Dec., 508, note; Scull v. Reeves, 29 Am. Dec., 694, 707.
4. Only insurance company can raise question that assignment was made without consent or written notice to it. Bacon on Benefit Societies & Life Ins., sec. 298; N. Y. Ins. Co. v. Flack, 56 Am.

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Barbour's Admr. v. Larue's Assignee, &c.

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Dec., 750; May on Ins., 396; Wood on Ins., sec. 361; Lee v. Murrell, 9 Ky. Law Rep., 104.

5. The assignee may maintain this action. Ky. Stats., sec. 84; 2 Black on Judgments, 3548, 726; Freeman on Judgments, sec. 158; VanFleet on Former Recovery, sec. 256.
6. As to the assignee's rights on the whole case. Larue v. Larue, 96 Ky., 326; Burrill on Assignments, sec. 65; Butler v. Golrey, 146 U. S., 303; Williams v. Heard, 140 U. S., 529; Bacon on Benefit Societies & Life Ins., sec. 297; May on Ins., secs. 388, 389; 86 N. C., 260.
7. As to the admissibility of parties in interest as witnesses as to what Larue said and did, he being dead. Burrill on Assignments, sec. 362; Flood v. Pragoff, 79 Ky., 607; Phillips v. Phillips, 81 Ky., 328; Williams v. Williams, 90 Ky., 28; 1 Wharton on Evidence, secs. 466, 470, and cases cited.
8. Appellants should be charged with interest on the money they received. Masonic Savings Bank v. Bangs, 10 Ky. Law Rep., 743; Kenton Ins. Co. v. First National Bank, 93 Ky., 129; Henderson Manufacturing Co. v. Lowell Machine Shops, 86 Ky., 668.

W. S. PRYOR ON SAME SIDE. (J. P. HOBSON OF COUNSEL.)

1. The assignment of Barbour & Daugherty was valid only to the extent of their debt; beyond that they have no interest in the life of Larue. Basye v. Adams, 81 Ky., 368; Burnam v. White, 16 Ky. Law Rep., 241; Throckmorton v. H. M. B. S., 4 Ky. Law Rep., 61; Warnock v. Davis, 4 Ky. Law Rep., 67, and cases cited. Any surplus would enure to the benefit of the creditors equally.
2. The former appeal of this case is conclusive against the contention of appellants upon all other points discussed. Larue v. Larue, 96 Ky., 331.

I. W. TWYMAN AND W. S. PRYOR FOR APPELLEES UPON A PETITION FOR A REHEARING

The decision of this court upon the former appeal is the law of this case and this opinion is a departure from the principles laid down in the former appeal.

JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this case. The opinion on the former appeal is reported in 96 Ky., 326 [28 S. W., 790]. After reciting the allegations of the petition, the court in that opinion say: "The only question to be determined in this case is whether or not the policies of insur-



ance passed under the deed of assignment for the benefit of the creditors, and that necessarily depends upon the intention of the assignor in taking out said policies of insurance on his life, and as expressed in said deed of assignment. The policies are not before us, nor copies of them. Their terms and conditions, and the beneficiaries thereof, are not known to us, save and except as stated in the petition and amended petition. Whether or not they were valuable as assets would depend upon the number of premiums that have been paid, the length of time they have to run, and their cash surrender value, if any; assuming that they had passed under the general deed of assignment, and that the assignor was still living. Like other choses in action, they are subjects of assignment. They are used daily in commercial transactions as a basis of credit, often being pledged as collateral securities for debt. They are not such assets as may be attached during the life of the assured, or sold under execution. We must, however, for the purpose of the demurrer, assume the facts stated in the petition and amended petition are true. The allegation therein that these policies were payable to the assignor, his order, or creditors, and that he used them as a basis of credit, stating that he had his life insured for the benefit of his creditors, coupled with the language used by him in the deed of assignment, indicated that he intended to pass them to his assignee for their benefit."

On the return of the case to the lower court, issue was joined and proof taken, and upon the final hearing the court adjudged both policies to the assignee, and from this judgment appeal is prosecuted.

The testimony shows that on the 28th day of August, 1891, Larue made an assignment to appellee for the benefit of his creditors, and that he furnished a very minute in-

ventory of the property covered by the assignment. Neither of the policies of insurance sued on was included in that inventory, but, following the inventory, the deed provides: "If I have omitted to name any property, accounts, or claims not herein mentioned in this deed, the same is hereby assigned and transferred to my assignee for the purpose aforesaid."

And this action by the assignee to recover the value of these policies is based upon this section of the deed of assignment.

The policy in the Equitable Life Insurance Company of New York was assigned to Barbour & Doherty on the 18th day of September, 1891, on the back of the policy, and is in these words: "Whereas, O. M. Barbour and William Doherty stand as my security for a large amount of money, and will evidently have to pay the same, and being unable in my financial condition to pay and keep up the premiums, and for value received, I hereby transfer and assign to Owen M. Barbour and William Doherty the full benefit of the within policy No. 518,711. Given under my hand this 18th day of September, 1891. L. L. Larue."

And a fuller assignment was made Barbour & Doherty on the 29th day of September, 1891.

At the time this assignment was made Barbour & Doherty were the sureties in a note for \$2,500 of Larue. The policy was dated the 5th day of March, 1891, and reads as follows: "The Equitable Life Assurance Society, in consideration of the written and printed application of this policy, which is hereby made a part of this contract, and the payment in advance of \$167, and of the annual payment of \$167, to be made thereafter at the office of the society in the city of

New York on or before the 24th day of February in every year during the continuance of this contract, does promise to pay to Lewis L. Larue, his executors, administrators, or assigns, at the office of the society in the city of New York, \$5,000, upon satisfactory proofs of the death of the said Lewis L. Larue, of Hodgenville, in the county of Larue and State of Kentucky."

Larue died on the 14th day of February, 1892. It appears from the testimony of G. G. Gaddie, the local agent who solicited this policy, that decedent did not have the money to make the first payment in full at the time the policy was issued, but that he advanced the premium for him, which was subsequently repaid to him, except \$37, for which he took the note of Larue. This \$37 note was paid to him by the assignees, Barbour & Doherty, after the assignment of the policy to them. Gaddie testifies that he applied to the assignee, Srygley, and that he declined to pay it, referring him to Barbour & Doherty as the proper persons to pay same.

The Kentucky policy was assigned to the Hayses on the 21st day of October, 1891. This policy was issued on the 21st day of February, 1891, the contract therefor being made by one Jesse L. Talbott, as agent for the company. The amount of the premium was \$162.35, and in this case, also, Larue did not have the money to pay the premium, and it was advanced for him by the agent of the company, who took the note of Larue therefor, payable to himself. Subsequently to the assignment the Hayses paid off this note to Talbott, and when the second premium on the policy fell due they also paid that. This policy recites "that it is issued in consideration of the sum of \$162.35, and of a like sum to be paid at the home office in the city of Louisville on or before the 2d day of February in every year there-

after." The policy provided that "if any premium, or part of premium, or any note given therefor, shall not be paid on or before the day on which it becomes due at the office of the company in the city of Louisville, or to an agent producing a receipt of the company signed by the president or secretary, the policy shall then become void, and insurance cease, without notice to the insured, or parties interested in this policy, or holders thereof: *Provided, however,* in case of default of the payment of the third or any subsequent annual payment, then this policy, without further negotiations or stipulations, shall be binding upon the company for such amount of non-participating paid-up insurance as specified in the table of paid-up values indorsed hereon."

This policy further recited "that it was issued and accepted upon the express conditions that the said L. L. Larue may, with the consent of the company, at any time assign it, or before assignment change the beneficiaries therein, or make any other change." At the date of the assignment of this policy to the Hayses, they were the securities of Larue for a sum largely in excess of the whole amount of the policy. On the 30th day of November, 1891, Larue made a will, which, subsequently to his death, was probated and admitted to record.

In the fourth clause thereof he recites: "Under the late transfer, the estate that I now hold, and am entitled to as allotted by law, I will and bequeath the same to be disposed of as follows: First, I will to my beloved wife, Emaline Larue, all of my personal property, of every character whatever, that may belong to me at the time of my death, to become absolutely hers, and to be disposed of by her as she may deem proper. Also, I will and bequeath to

her all of my right and interest in and to a homestead of \$1,000, to be disposed of as she may deem proper. I hereby will that H. D. Larue collect my life insurance policy in the Equitable Life Insurance Company of New York, \$5,000, pay to O. M. Barbour the amount of his lien on said policy and to Miss Lizzie Dorsey \$1,000, the amount of her lien on the homestead property, and, after the payment of the firm debts of Larue & Son, composed of L. L. Larue and H. D. Larue, the balance to be equally divided between my two sons, H. D. Larue and W. L. Larue. I hereby name and appoint my son H. D. Larue as my executor to carry out the provisions of this my last will and testament."

On the next day thereafter he made this codicil: "I hereby amend and add to my will, as made on the 30th day of November, 1891, that my insurance policy in the Mutual Insurance Company of Kentucky, dated February 2, 1891, for the sum of \$5,000, the same held by J. R. Hays and Elijah Hays under the transfer heretofore made by me, be collected by them, and the proceeds thereof equally divided between them. They having paid large amounts as my securities heretofore, and said policy having been heretofore assigned and transferred to them by me, it is my will that they have said policy for their sole use and benefit, their heirs and assigns forever."

There is evidence in the record which conduces to show that decedent, Larue, had been carrying policies of insurance on his life for a number of years before his voluntary assignment to Srygley, and that at the time he held policies, other than those in contest in this action, which were permitted to lapse by non-payment of premiums. There is not a particle of evidence in this record which shows that he ever contracted

any new indebtedness subsequent to the taking out of these policies, or that he had ever obtained any credit on the basis thereof.

The question to be determined on this appeal is whether either of the policies of insurance in contest in this action at the time of the assignment stood for a tangible substantial, property right, having such ascertainable value as to make them an appreciable part of the estate of decedent. It is conceded, under the terms of the policies, that they had no withdrawal cash value, which either Larue or his assignee could have realized from the companies; and it seems to us that the proof is absolutely overwhelming that neither Larue nor his assignee, Srygley, thought at the time of the assignment that they passed thereunder. This is shown by the minute inventory of the assigned property made out by Larue, which does not include the policies in contest, and by the fact that, subsequently thereto, he openly assigned these policies to appellants, and thereafter ratified by will the disposition he had made thereof, and provided for the disposition of the overplus which would belong to his estate arising from the New York policy assigned to Barbour & Doherty. He directed that a part of this surplus should be used to pay off the mortgage upon the homestead, which belonged to him as exempt property under the deed of assignment, and that the surplus, after this was done, should belong to his children.

Larue did not pay all of the first premium due on either of these policies; but, as the companies received the money, and the indebtedness for the unpaid premium was due to the agents in their individual capacity, the companies had no right to cancel either of them for the non-payment of the notes executed to their agents,

Gaddie and Talbott. But it is true that the Kentucky policy would have lapsed if appellant Hays had not paid the second premium at the date of its maturity, and it can not be contended that the assignee, Srygley, did anything, or intended to do anything, towards keeping alive either policy. He was not a creditor or surety of Larue, or in any way related to him. He had no pecuniary interest whatever in Larue, and, under the deed of assignment, the only duty imposed upon him was to take charge of the assigned estate, convert it into money, and distribute it among the assignor's creditors. There was nothing in the deed of assignment which authorized him to use the moneys of the estate to pay the premiums due upon these policies during the bankrupt's life, and to have done so might have kept the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death.

Until these policies of insurance had been carried to that point where, under the terms of the policies themselves, they had a value, it does not seem to us that they can be considered as representing any real property right or interest which would pass to the assignee. Even if he had been authorized by law to use the estate assigned to him to keep alive these policies, it would have been a mere chance if the creditors profited thereby, as usually such policies, instead of being an advantage and source of profit, are a burden upon him who must pay the premium.

A similar question was considered *in re McKinney*, 15 Fed. Rep., 536, decided in the United States District Court for the Southern district of New York. In that case the court said:

"Looking at this policy as it stood at the time

of the bankruptcy, it presents two different elements: (1) Its cash surrender value at that time; (2) its character as an executory contract, whereby the bankrupt or his representative was to pay an annual premium during his life, and observe numerous other conditions specified in the contract, and the company, if all these conditions were observed, was to pay the sum of \$3,000 at his death. The first of these elements, the surrender value of the policy, arises from the fact that the fixed annual premium is much in excess of the annual risk during the earlier years of the policy—an excess made necessary in order to balance the deficiency of the same premium to meet the annual risk during the latter years of the policy. This excess in the premium paid over the annual cost of insurance, with accumulations of interest, constitutes the surrender value. Though this excess of premiums paid is legally the sole property of the company, still, in practical effect, though not in law, it is moneys of the assured deposited with the company in advance to make up the deficiency in later premiums to cover the annual cost of insurance, instead of being retained by the assured and paid by him to the company in the shape of greatly increased premiums, when the risk is greatest. It is the 'net reserve' required by law to be kept by the company for the benefit of the assured, and to be maintained to the credit of the policy. So long as the policy remains in force, the company has not practically any beneficial interest in it, except as its custodian, with the obligation to maintain it unimpaired and suitably invested for the benefit of the insured. This is the practical though not the legal, relation of the company to this fund. Beyond this interest in the surrender value, I think nothing passed to the assignee in bankruptcy save the naked title to the policy in order to make the in-



terest available. As an executory contract, aside from its surrender value, the policy had no pecuniary value whatever. Assuming that the bankrupt had the average expectation of life, as a mere contract, for future insurance, it would be a burden, rather than a benefit, to the estate; for, whatever might be afterwards obtained from it (beyond the present surrender value), a still greater sum must presumably be paid out, in the shape of future premiums and interest, in order to keep the policy alive, since these premiums, with interest, on the average, not only equal the amount ultimately payable, but all of the company's expenses and profits in addition. As an executory contract, therefore, aside from its surrender value, the policy was not 'property' or 'effects' but an incumbrance, which the assignee would be bound to reject, like leases at an unfavorable rent.

"The assignee, moreover, could have no right to use the moneys of the estate to pay the premiums during the bankrupt's life, and thus keep the estate unsettled for an indefinite period, for the mere purpose of speculating upon the chances of the bankrupt's early death. The speedy settlement of the estates of bankrupts, as contemplated by law, is incompatible with such dealings."

Bishop on Insolvent Debtors (section 175) says: "The assignee takes only such rights as the debtor himself had or could assert at the time of making the assignment."

In the second volume of May on Insurance the author says:

"The assignment of a life policy is not affected by a prior general assignment in favor of creditors, where it appears that the policy remained in the hands of the assignor, and

never came into the possession of, or was claimed by, the assignee for creditors."

See, also, 49 Hun., 192, 193, [1 N. Y. Supp., 854].

And in the case of *Johnson v. Alexander* (decided by the Supreme Court of Indiana, November 11, 1890) [9 Lawy. Rep. Ann., 660 (s. c. 25 N. E., 706)], the court said:

"An arrangement is not void, as a fraud on creditors, by which an insolvent debtor, soon after taking out insurance on his own life, payable at his death to his executors, administrators, or assigns, assigns the policy to certain of his creditors to secure the payment of their claims, taking from them an agreement to pay the premiums, and, after deducting the amount of such payments and of their claims from the proceeds of the policy, to pay the balance to his heirs or to his order; and if no other disposition is made by him the heirs are entitled to such balance, as against other creditors of assured, at least where there is no evidence of actual fraud, or that such creditors were injured by the arrangement;" the court further saying: "The law favors the making of a reasonable provision by a man for his family and those who are dependent upon him, and it is not a violation of the statute, and no fraud on creditors, for a debtor though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family."

In the case of *Central National Bank v. Hume*, 128 U. S., 195 [9 Sup. Ct., 41], it is held that "a man may rightfully devote a moderate portion of his earnings to insurance on his life, and thus make a reasonable provision for his family; and, though he be insolvent, such payment is not a fraudulent transfer of his property; and that, after his decease, his creditors will have no interest in the policy."

In Appeal of McCutcheon, 99 Pa. St., 133, it is held: "When a person takes out a policy of insurance upon his own life in his own name, and subsequently assigns same to his wife, child, or other dependent relative, the mere fact that the assignor is insolvent at the time of making the assignment does not warrant the inference that the assignment was a fraud on creditors."

2 Bigelow, Frauds, p. 129 says: "A debtor, though insolvent may use his earnings to pay for insurance on his life in favor of his family."

At the date of the general assignment by Larue these policies had no appreciable pecuniary value. They represented no sum for which collection could have been enforced from the insurance companies, either by Larue or his assignee. They became valuable thereafter only by reason of the failure in the health of assured. He had paid nothing on the Kentucky policy with which his estate was chargeable and an apparently small sum upon that assigned to Barbour & Doherty; and under the assignment this policy, after providing for the payment of the debt on which Barbour & Doherty were sureties, under the will of Larue the balance goes to discharge the mortgage debt upon his homestead and to his children.

It has been the policy of this State for many years to encourage the making of reasonable provision by men for their families, and for others interested in the preservation of their lives, by the taking out of life insurance for their benefit. As early as 1870 the Legislature enacted section 655 Kentucky Statutes, which provides:

"When a policy of insurance is effected by any person on his own life, or on another life in favor of some person other than himself, having an insurable in-

terest therein, the lawful beneficiary thereof, other than himself or his legal representatives, shall be entitled to its proceeds against the creditors and representatives of the person effecting the same: provided, that, subject to the statute of limitations, the amount of any premiums for said insurance paid in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy."

Thus, clearly authorizing any person to take out a policy on his own life for the benefit of another having an insurable interest therein, and securing the proceeds thereof to such beneficiary; provided, however, that any premiums paid in fraud of creditors to maintain such policy should inure to their benefit from the proceeds of the policy.

There is no contention here that the premiums paid on either of the policies in controversy were paid in fraud of the rights of creditors, and it would appear that there can be no valid reason why a person could not assign or transfer policies of insurance already taken out payable to his estate, which had no pecuniary value, to any other person having an insurable interest in his life. In our opinion, these policies of insurance had no withdrawal or pecuniary value at the date of the assignment, and did not pass thereunder. Barbour & Doherty acquired no interest in the policy assigned to them beyond the debt which it was transferred to secure, as beyond this they had no insurable interest in the life of the assured.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

THE WHOLE COURT, EXCEPT JUDGE HOBSON, CONSIDERED THIS CASE.

CASE 67—INJUNCTION AGAINST OBSTRUCTING STREAM—  
MAY 6.

## Murray, Etc. v. A. &amp; L. M. Preston.

## APPEAL FROM JOHNSON CIRCUIT COURT.

1. **NAVIGABLE STREAM.**—A stream is a navigable one if it is ordinarily subject to periodical fluctuations attributable to natural causes and recurring naturally, and if its periods of high water and navigable capacity usually continue a sufficient time to make it useful as a highway.
2. **SAME—CONSTITUTIONAL LAW.**—Unless a stream is navigable in fact the Legislature may not, by declaring it so, deprive the riparian owner of his right to construct water gates and other obstructions without compensation.

**JAMES GOBLE FOR THE APPELLANTS.**

1. The Legislature has no constitutional power to deprive a riparian owner of his rights by declaring a stream navigable which is not so in fact.
2. The appellee, Arthur Preston, was estopped to claim the right in question because it appears that at the time of the passage of the act he had a right over appellant's land by contract for the purpose of removing the very staves whose removal is the gravamen of this action.

Citations: Acts of 1886-7, vol. 1, p. 62; Wood on Railway Law, vol. 2, pp. 868, 889, 707; Berry v. Snyder, 3 Bush, 277; 8 Bush, 326; Gould on Waters, secs. 54, 108, 109, 243, 241, 242; Cooley on Con. Lim. (5th ed.), pp. 728, 729, 675, 657; Gen. Stat., ch. 77, secs. 1, 9; Robinson v. Swope, 12 Bush, 26.

**STEWART & STEWART FOR THE APPELLEES.**

1. Chestnut creek is not navigable or floatable in fact for the purpose of floating the products of its forests to market, and appellees had the right to thus use it, being responsible only for damages caused by negligence in exercising that right.
2. The agreement between the parties as to the haul-way over appellant's land can not affect the navigability of Chestnut creek even if the contract by its terms was then in effect or the contract by its terms had expired and appellees had no right under it.
3. Chestnut creek became navigable in law whether navigable in

Murray, &c., v. A. & L. M. Preston.

fact upon the passage of the act of the Legislature declaring it navigable.

Citations: Thunder Bay R. B. Co. v. Speechly, 31 Mich., 336; Gaston v. Mace, 33 W. Va., 14; Angell on Watercourses (7th ed.), sec. 537; Weise v. Smith, 3 Ore., 445; Folger v. Robinson, 3 Ore., 458; Goodins, Ex., v. Ky. Lumber Co., 90 Ky., 625; James v. Carter, 16 Ky. Law Rep., 515; Ford Lumber Co. v. McQueen, 14 Ky. Law Rep., 521; May, &c., v. Blackburn, 15 Ky. Law Rep., 705; Olson v. Merrill, 42 Wis., 203; Thurman v. Morrison, 14 B. M., 296; Pursell v. Stover, 110 Pa. St., —; Plum v. Mitchell, 16 Ky. Law Rep., 162; Francis v. Ramsey, 16 Ky. Law Rep., 870; Collins v. Howard, 65 N. H., 190; Harold v. Jones, 86 Ala., 274; Jaram v. Patterson, 7 Mon., 644.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Appellees had a large quantity of staves on the waters of Chestnut creek, in Johnson county, which they desired to float down the stream, and with this view, obtained an act from the Legislature declaring it a navigable stream. Appellant owned the land on both sides of the creek near its mouth, and had placed water gaps across it, in his fencing; he also had a mill and dam, which he had maintained for many years; and he objected to appellees clearing out the stream and floating their staves out. They then obtained an injunction enjoining him from obstructing the stream, and on final hearing the injunction was made perpetual; and he was required not to put any water gaps across the creek, or do anything else that would interfere with its use as a navigable stream.

He seeks the reversal of this judgment.

The first question is, what is the effect of the act of the Legislature declaring this creek a navigable stream?

The Constitution of the State forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of

the owners of the adjoining lands. If it was the private property of appellant, within the boundary of his land, the Legislature could not divest him of his rights by simply calling it a navigable stream, when it was not one in fact. The rule on this subject is thus stated in Cooley on Constitutional Limitations (side page 591):

"The question, what is a navigable stream, would seem to be a mixed question of law and fact; and, though it is said that the Legislature of the State may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the Legislature can not make it so by simple declaration, since, if it is private property, the Legislature can not appropriate it to a public use without providing for compensation."

It remains, therefore, to consider whether this creek was in fact a navigable stream when so declared by the Legislature. It is not contended that it was navigable for boats or other water craft, but only that it was a floatable stream. The law in regard to this kind of streams is well stated by a standard author as follows:

"There is a class of streams which, although not navigable by boats or lighters, are yet susceptible, for the whole or a portion of the year, of valuable use for the purpose of floating logs and other products of the country along their banks to market or to mills, and which are considered, to that extent, navigable. But if such stream, in its natural state, is not floatable, it is absolutely private, and, though made floatable by the owner by artificial means, is not subject to public use, nor where it is only fit for that purpose during high water or periodical freshets. A stream that would not float logs without the aid of a person in a canoe, or of

people on the banks, to push them along, and when the logs are frequently injured by the difficulty in passing them through, is not a navigable stream. The public may use a stream for floating logs, although it may injure the riparian owner, or, although it may at times be necessary to go upon its banks to effect such floating, and one is not liable to a riparian owner on whose land they strand. But a needless obstruction, or negligence in any respect, will render the party liable." 6 Lawson, Rights, Remedies and Practice, section 2928.

In *Treat v. Lord*, 42 Me., 552, [66 Am. Dec., 298], the Supreme Court of Maine said: "The stream, in order to have the character of a public highway, must, in and of itself, have a capacity for floating logs. Such a stream, as well as our larger rivers, will, as experience has universally shown, from its windings and the rush of its waters, especially in times of freshets, cast many of the logs which float upon its bosom upon its shores, intervalles, and banks, thereby rendering it necessary to go upon such uplands for the purpose of making a clean drive. Such incidental necessity neither enlarges nor diminishes the natural capacity of the stream, nor in any way affects its public character. . . . While, therefore, it is true that persons driving logs may go upon the banks of our public streams and rivers as necessity may require, it is also true that a stream which is so small and shoal in its bed that no logs can be driven in it without being propelled by persons traveling on its banks is private property, and not subject to such public servitude as is claimed in this case. By the common law it is clear that the public have no right to go upon the banks of ancient navigable rivers for the purpose of towing; and it is said by the court in the case of *Brown v. Chadbourne* [31 Me., 9; 50 Am. Dec., 641], that



where a river can not be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity for public use; and we think such fact is conclusive that no such public servitude exists."

In the subsequent case of *Hooper v. Hobson* [57 Me., 273; 99 Am. Dec., 770], the same court said:

"The water makes and defines the highway. . . The right which the public enjoys in a navigable stream is, in general, limited by its banks."

It is not essential that the capacity of the stream should be continuous, to constitute it a public highway. It is sufficient if it is ordinarily subject to periodical fluctuations, attributable to natural causes, and recurring regularly, like the seasons, and if its periods of high water and navigable capacity usually continue a sufficient length of time to make it useful as a highway. After reviewing the authorities in *Thunder Bay Booming Co. v. Speechly*, 31 Mich., 336 [18 Am. R., 184], Judge Cooley well sums them up thus:

"The doctrine, then, which we derive from the cases, is that a stream may be a public highway for floatage when it is capable, in its ordinary and natural stage in the seasons of high water, of valuable public use."

The rule stated by these authorities forbids Chestnut creek being ranked as a navigable stream. The proof is clear that it is less than four miles long from its mouth to its head on the top of the ridge. It is about ten feet wide, and, though in time of freshets receiving a considerable volume of water, it runs down in a few hours. Notwithstanding there is a quantity of timber on its water shed, the evidence is very unsatisfactory that it has ever been used to any practicable extent for floating logs or other

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Howard and Rice v. The Thompson Lumber Co.

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products. It appears that it was not practicable to use it, even for floating the staves out, without going on the banks and poling them along. Upon the principle that the water is the highway, there can be no highway if the quantity of water is insufficient for its reasonable use for this purpose in ordinary stages of high water. The quantity of water in this creek, its width, its use, and the length of time it remained up in time of freshets, all show that it is only what is commonly known as a "brook" or "branch," and as such was the private property of appellant. He could not be required to take down his water gaps across it, or to allow appellees to pass over it with their staves, against his wishes and without compensation. See *Hubbard v. Bell*, 5 Am. Rep., 99; *Lewis v. Coffee County*, 54 Am. Rep., 55; *Morgan v. King*, 91 Am. Dec., 58.

The judgment is therefore reversed, and cause remanded, with directions to the court below to dissolve the injunction and dismiss the petition.

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CASE 68—ACTION ON CONTRACT—MAY 10.**Howard and Rice v. The Thompson Lumber Co.**

APPEAL FROM BELL CIRCUIT COURT.

**CONTRACTS—FORFEITURES—WAIVER.**—The right reserved by appellee, one of the parties to a contract, to retain, as a forfeiture, a reserved percentage of the contract price for services to be rendered in cutting and hauling timber to its mill, will be treated as waived by its acceptance of appellant's services under the contract after its breach and by its urging appellants to go on with their compliance with the contract.

**WELLER & HAYES FOR THE APPELLANTS.**

The lower court erred to the prejudice of the appellants,

1. In not letting the jury decide as a fact whether appellants

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Howard and Rice v. The Thompson Lumber Co.

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were damaged by reason of having timber hauled from December 20, 1895, to January 15, 1896.

2. In not letting the jury decide as a fact whether appellees declared a forfeiture or waived the right to declare a forfeiture on account of the failure of the appellants to haul the quantity of timber each month or period as called for in the contract.

3. In not allowing the jury to say whether appellants were damaged on any other item claimed in the petition and shown in the evidence.

4. In failing to give the instructions asked for by appellants.

Citations: Addison on Contracts, pp. 239, 241; Clark on Contracts, p. 676; Lawson on Contracts, p. 459; 1 Litt., 3; Phillips v. Cont. Co., 91 U. S., 650; Eyster v. Parrot, 83 Ill., 517.

**D. B. LOGAN FOR THE APPELLEE.**

1. The peremptory instruction was proper.

2. Appellants by their own showing were not entitled to maintain their case.

3. Assumption of control of appellee's timber and discharge of appellants from the contract was proper.

Citations: 3 Am. & Eng. Ency. of Law, 914, 916 and notes; Lawber v. Bangs, 2 Wall., 728; 14 Bush, 51.

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

On the 4th day of December, 1895, appellants agreed with appellee that, in consideration of \$3.25 per thousand feet, they would haul and deliver at its mill yard all of the popular saw logs to be cut on a tract of land owned by appellee. The work was to begin on or before December 20th, and appellants were to deliver as much as 150,000 feet by the 1st day of March, 1895, and in each succeeding month thereafter as much as 120,000 feet, until all the logs were hauled and delivered; the entire job to be finished not later than the 15th day of August, 1896. Appellants were, at their own expense, to build their own tramways; appellee to furnish the lumber. Appellee was to have the logs ready, so as not to delay appellants at any time in the performance of the contract. Appellants agreed to begin the construction of the tramway up Rich Branch as soon as they began work, and to complete it as soon as it could

actually delivered, and its request to appellants at the time to continue the work, waive its right in July to declare a forfeiture of the contract, and retain the 10 per cent. on monthly estimates and the 75 cents per thousand feet as its property?

Mr. Lawson, in his work on Contracts (section 455) says:

"The performance of a condition may be waived by the party who has a right to enforce it, in which case the latter will be precluded from relying upon the performance of the residue as a condition precedent to his liability, but must perform the contract on his part, and rely upon his claim for damages in respect to the defective performance. Thus, where one of the parties to a contract is bound to do certain work within a certain time, and fails to complete it within the stipulated time, and the other party urges him to go on, this is a waiver of strict performance as to time, and a recovery may be had on the basis of the amount and value of the work done, reckoned at the contract price, deducting damages for the delay."

And in discussing this question in the case of *Colby Construction Company v. Seymour, et al*, 91 U. S., 650, Justice Miller says:

"Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before that party can sustain in a suit against the other. There is no doubt that in this class of contracts, if a day is fixed for performance.

the party whose duty it is to perform or tender performance first must do it on that day, or show his readiness and willingness to do it, or he can not recover in an action at law for non-performance by the other party."

But, both at common law and in chancery, there are exceptions to this rule, growing out of the nature of the thing to be done and the conduct of the parties. The familiar case of part performance, possession, etc., in chancery, where time is not of the essence of the contract, or has been waived by the acquiescence of the party, is an example of the latter. . . .

If the builder has done a large and valuable part of the work, but yet has failed to complete the whole or any specific part of the building or structure within the time limited by his own covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor can not recover on the covenant, because he can not make or prove the necessary allegation of performance on his own part. What remedy he may have in *assumpsit* for work and labor done, materials furnished, etc., we need not inquire here; but, if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his own covenant for the contract price when completed."

And this principle of law was adhered to in the case of *Henderson Bridge Company v. O'Connor & McCullough*, 88 Ky., 303, [11 S. W., 18, 957].

Appellee, in accepting the logs actually delivered, and paying therefor, and in urging and encouraging appellants to go ahead with the work, waived its right to claim the

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Smith, &c., v. Scanlan.

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forfeiture of the 10 per cent. on monthly settlements and the 75 cents per thousand feet for failure to complete the tramway, and appellants are entitled to maintain this action to recover the amount due them under the contract for logs actually delivered; but appellee is entitled to recoup by way of set-off or counterclaim damages sustained on account of the failure of appellants to keep their contract, unless such failure was occasioned by the fault of appellee. These are proper questions for the jury.

For reasons indicated, we think the court erred in giving a peremptory instruction in this case, and it is therefore reversed, and the cause remanded for proceedings consistent with this opinion.

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CASE 69—DISTRESS FOR RENT—MAY 12.

## Smith, Etc. v. Scanlan.

APPEAL FROM CHANCERY DIVISION OF JEFFERSON CIRCUIT COURT.

**LANDLORD AND TENANT—LIABILITY FOR RENT OF PURCHASER OF LEASE-HOLD.**—The holder of a lease for ten years sublet the premises for eight years with an option for the other two, and then assigned his leasehold to his wife with the fraudulent purpose of defeating his creditors. A creditor of the lessee caused an execution to be levied on the lessee's interest and the sub-tenant became the purchaser. The lessee caused a distress warrant to be issued against the sub-tenant for rent which the latter enjoined. It is held:

1. That the sub-tenant could buy his landlord's leasehold at execution sale and did not thereby become liable to him for rent.
2. The fraudulent assignment of the leasehold to the lessee's wife did not prevent his creditor from levying on and selling his interest under the execution, nor
3. Did the contract between the lessee and the sub-tenant prevent the former's interest from being sold under execution.

**LANE & BURNETT** FOR THE APPELLANTS.

The sub-tenant, Scanlan, being liable for Smith and wife for rent at the time of the purchase of the leasehold by him under

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Smith, &c., v. Scanlan.

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execution his purchase enured to the benefit of Smith and wife and he became liable to them for rent. Taylor, Landlord & Tenant, secs. 124, 180, 705-6.

JOHN ROBERTS AND WILLIAM FURLONG FOR APPELLEES.

1. The evidence not being in the record is presumed to sustain the judgment of the court below. Terrell v. Rowland, 86 Ky., 756; Huffaker v. National Bank of Monticello, 13 Bush, 649; Bowman v. Holloway, 14 Bush, 428.
2. A tenant has the right to purchase at public sale the interest of his landlord and the relation of landlord and tenant is not that of trust nor is it the subject of equitable cognizance. Genl. St., ch. 63, sec. 16; McMurtry v. Adams, 3 Bush, 70.

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Appellant W. C. Smith leased of John Caperton and wife for ten years from January 1, 1880, a lot of ground on Ninth street in Louisville, Ky. He then sublet the property to appellee, Jerry Scanlan, for a term ending in the year 1888, with the option to continue the lease two years longer. After this, on March 15, 1887, he assigned his leasehold to his wife, the appellant M. S. Smith, as is alleged, without consideration when he was insolvent, and for the purpose of defeating his creditors. In July following, Ainslie, Cochran & Co. caused an execution in their favor against W. C. Smith to be levied on his leasehold estate in this property, and had it sold on August 1st, under the levy. Appellee, Jerry Scanlan, became the purchaser. Some time after this appellants set up a claim against appellee for rent, on the ground, among others, that, being in possession as tenant, his purchase under the execution inured to the benefit of the landlord. The court below having decided against them, and enjoined them from attempting to collect rent from appellee, they have prosecuted this appeal.

The evidence heard by the court below is not in the record, and it must be presumed that the chancellor's findings of fact are correct. This leaves in the case only the

naked question of law as to the effect of appellee's purchase.

In selling and conveying property under execution, the sheriff acts as the agent of the defendant. Rorer on Judicial Sales, sections 54-56. At such a sale the tenant in possession may buy to protect himself, and his purchase will no more inure to the benefit of the landlord than if he had bought from the landlord himself in person.

In Taylor on Landlord and Tenant, after stating some exceptions to the rule that a tenant can not deny his landlord's title, the author adds:

"And a tenant may acquire and set up a title consistent with that admitted by the demise; as, if he purchase the premises at a tax sale made during his term."

And in a note to this he adds:

"So, if he buy in the whole or a part of the lessor's title at a tax or execution sale, or by private purchase, it is a proportionate defense to suit for rent or ejectment. *Nellis v. Lathrop*, 22 Wend., 121; [24 Am. Dec., 285]; *Evertson v. Sawyer*, 2 Wend., 507; *Bettison v. Budd*, 17 Ark., 546; [65 Am. Dec., 442]; *Camley v. Stanfield*, 10 Tex., 546; *Elliott v. Smith*, 23 Pa. St., 131; *George v. Putney*, 4 Cush., 351."

The contract between W. C. Smith and appellee, as set out in the record, did not divest Smith of the title to his leasehold in the property; nor did it constitute any obstacle to the subjection of that estate to Smith's debt under the execution. The purchaser, so far as appears from the record, took the property under his purchase, acquiring all the rights that Smith had.

The fraudulent conveyance to the wife was no obstacle to the subjection of the property under execution against the husband. *Daniel v. McHenry*, 4 Bush, 277, and cases cited. Judgment affirmed.



CASE 70—ACTION TO SUBJECT HOMESTEAD—MAY 12.

**Benge's Administrator v. Bowling, Etc.**

APPEAL FROM CLAY CIRCUIT COURT.

**HOMESTEAD—ANTECEDENT LIABILITY.**—A covenant of general warranty creates a liability within the meaning of section 1702, Kentucky Statutes; and where the covenant is executed prior to the acquisition of the homestead the latter is subject to the warranty claim, though the eviction occurred after the homestead had been acquired.

**A. W. BAKER FOR THE APPELLANT.**

1. The warranty to Benge executed in 1881 created a liability which was prior to the acquisition of the homestead.
2. There was no estoppel by the allegations of the pleadings in the action on the covenant of warranty.

Citations: Ky. Stats., sec. 1702; 7 Am. & Eng. Ency. of Law, 2, and foot notes; Hanley v. Foley, 18 B. M., 519; Booker v. Bell, 3 Bibb., 173.

**LITTLE & JEFFRIES FOR THE APPELLEE.**

1. The estoppel pleaded in the amended rejoinder is a defense to a recovery sought to be had by the appellant.
2. The liability or right of action under which appellant recovered the common law judgment accrued after the purchase of and payment for the homestead sought to be subjected.

Citations: 5 Lawson's Rights, Rem. & Pr., secs. 2225, 2301; 6 Ad. & E., 439; Pickard v. Sears, 7 Am. & Eng. Ency. of Law, 2, 3; Morford v. Bliss, &c., 12 B. M., 257; 2 Pom. Eq. Jur., sec. 804, 805; Stephens Dig. of Law of Ev., p. 124; Booker's Admr. v. Belle's Exr., 3 Bibb., 173; Fitzhugh, &c., v. Croghan, 2 J. J. Mar., 438; Fowler v. Chiles, 4 J. J. Mar., 506; Merrifield v. Tyler, 8 Ky. Law Rep., 422; Graham v. Dyer, 16 Ky. Law Rep., 541.

**JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.**

By a deed made in October, 1881, the appellee, Bowling, was liable to the vendee, Benge, on the warranty contained therein. Before the covenant was broken by the eviction of the vendee, the appellee bought and paid for

the land which is sought to be subjected to the payment of the judgment which was rendered against the appellee on the warranty. So the eviction of appellant's intestate took place after appellee had purchased the land to which he is entitled as a homestead, unless the warranty in the deed created a *liability*, in the meaning of section 1702, Kentucky Statutes, part of which reads as follows: "But this exemption shall not apply to sales under execution, attachment or judgment, if the debt or liability existed prior to the purchase of the land, or of the erection of the improvements thereon."

The question in this case is whether the covenant of warranty created a liability, or did the liability in consequence of such warranty, arise when the eviction took place? If the liability was created by the warranty, then the land claimed as a homestead is subject to the payment of the judgment on the warranty. If no liability existed on the warranty until the eviction took place, then the land is exempt as a homestead, because it was purchased and paid for previous to that date. Liability is defined by Black's Law Dictionary to be "the state of being bound or obliged in law or justice to do, pay, or make good something; legal responsibility." Webster defines it to be "the state of being bound or obliged in law or justice; responsibility." Bouvier defines it to be "responsibility; the state of one who is bound in law and justice to do something which may be enforced by action." When the covenant of warranty has been broken by eviction, the liability on the warranty does not then accrue, but the cause of action then accrues on the liability which the vendor assumed by his covenant of warranty. It is by reason of the existing liability, resulting from the warranty, that the cause of action accrues. An obligation to

pay money at a future time creates a liability, and when the promisor breaks his promise to pay the cause of action accrues.

This court has held that, where the vendee has been evicted, he is entitled to recover the money which he paid, and interest thereon from the date of the deed containing the warranty, not interest from the date of the eviction. It treats it as a liability incurred as of the date of the deed. The moment the deed is executed and accepted, the vendor promises the vendee, in effect, that, if he is evicted from the land which he conveys to him, he will repay him the purchase money, with interest thereon from the date of the deed. This obligation, however, can not be enforced, and no cause of action arises until the happening of the event which entitles the vendee to have his money, with interest, refunded, and, upon the failure of the vendor to do so, his right to maintain an action begins. If we should hold that no liability existed upon the covenant of warranty until eviction, the vendor could invest the purchase money in a homestead the same day or day after receiving it, and, although the vendee from whom he obtained it was evicted within twelve months thereafter, still the homestead in which he had invested it could not be subjected to the payment of such judgment as his vendee might recover against him for the breach of the covenant of warranty. The mere fact that years may elapse between the execution of the deed and the eviction does not affect the question as to whether the warranty created a liability, or lessen the legal or moral obligation of the vendor to refund, with interest, the amount which he received from the vendee. The liability imposed by a warranty is as just, and the vendor should be no more permitted to hold his homestead against it than, any other

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New Farmers Bank's Trustee v. Cockrell, Receiver.

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debt or liability which he might have incurred prior to the purchase of the homestead.

We think the evidence authorizes the court below to adjudge Mrs. Gray the fifty acres of land which her father sold her. We do not think there is any merit in the question of estoppel raised.

The judgment is reversed for proceedings consistent with this opinion.

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CASE 71—FOLLOWING TRUST FUNDS—MAY 13.

New Farmers Bank's Trustee v. Cockrell,  
Receiver.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

**TRUST FUNDS.**—A trustee who, in carrying out the provisions of his trust, deposits the trust funds in a bank with an agreement that he is to receive interest on same, becomes merely a creditor of the bank and when the trust funds become commingled with the general funds of the bank and the bank then makes an assignment the trustee is not entitled to payment as a preferred creditor.

**STONE & SUDDUTH AND JOHN C. MILLER FOR APPELLANTS.**

1. The deposit of the trust funds in the bank by the trustee created the relation of debtor and creditor only, between them. *Taylor's Admr. v. Taylor's Assignee*, 78 Ky., 471; *Williams v. Rogers*, 14 Bush, 788.
2. Admitting that the bank was the real trustee and receiver, yet appellee has not traced the trust funds into the hands of the assignee, and therefore is entitled to no preference. *Allen v. Russell*, 78 Ky., 112; *Ellis v. Johnson*, 4 Ky. Law Rep., 991; *Story's Eq. Jur.*, 1259; *Commercial Natl. Bk. v. Armstrong*, 39 Fed. Rep., 684; *Wetherell v. O'Brien*, 140 Ill., 151; *Ill. Bank v. First Natl. Bk.*, 15 Fed. Rep., 858; *Bank v. Weems*, 6 S. W. R., 802; *McClure v. Board*, 34 Pac. R., 34; *St. Louis Brew. Assn. v. Austin*, 13 So. Rep., 908; *Cavin v. Gleason*, 105 N. Y., 256; *Anhauser-Busch Assn. v. Bank*, 53 N. W. R., 1037; *Nonotuck Silk Co. v. Flanders*, 58 N. W. R., 383; *Shields v. Thomas*, 14 So. Rep., 484.

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New Farmers Bank's Trustee v. Cockrell, Receiver.

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**C. P. CHENAULT, ON THE SAME SIDE, IN A BRIEF AND SUPPLEMENTAL BRIEF.**

1. The loan of money to a bank by a trustee was in furtherance of the trust and not in violation of it. The bank was therefore not a trustee for the original beneficiaries. *Mills, &c., v. Swearinger, &c.*, 67 Tex., 270; *Beach on Trusts, &c.*, sec. 98.
2. If the bank were a trustee the appellee's claim was not a preferred claim. *Hampton v. Morris*, 2 Met., 336; *McKee v. Scobee*, 80 Ky., 124.
3. The appellee had no preferred claim under the voluntary assignment law of 1894 even if that law were applicable.
4. If it be contended that the cash in bank at the time of assignment can be said to be the trust funds, the case of *Phil. Nat. Bk. v. Downd*, 2 L. R. A., 480, clearly shows the contrary.

**W. A. SUDDUTH AND JOHN C. MILLER IN A SUPPLEMENTAL BRIEF FOR THE APPELLANT.**

1. There being no attempt on the part of plaintiff to trace the alleged trust funds into the hands of the assignee of the bank, he is not entitled to a preference, even admitting that the bank was a trustee. *Story's Eq. Jur.*, sec. 1259; *Perry on Trusts*, sec. 841; *Pomeroy's Eq. Jur.*, sec. 1051; *Bright v. King*, 20 Ky. Law Rep., 186; *Bevan v. The Bank*, 19 Ky. Law Rep., 1261; *National Bank v. Downd*, 38 Fed. Rep., 172; *Peters v. Bain*, 133 U. S., 670; *National Bank v. Armstrong*, 39 Fed. Rep., 684; *Bank v. Latimer*, 67 Fed. Rep., 27; *Brewing Assn. v. Clayton*, 56 Fed. Rep., 759; *Spokane County v. Clark*, 61 Fed. Rep., 538; *Nonotuck Silk Co. v. Flanders*, 58 N. W. R., 383 (overruling *McLeod v. Evans*, 66 Wis., 401); *Holmes v. Gilman*, 138 N. Y., 369; *Little v. Chadwick*, 151 Mass., 109; *Brewing Assn. v. Austin*, 13 Sou. Rep., 98; *Shields v. Thomas*, 14 Sou. Rep., 84.
2. The relation between the depositor and the bank is that of creditor and debtor. *Taylor's Admr. v. Taylor's Assg.*, 78 Ky., 471; *Williams v. Rogers*, 14 Bush, 788.
3. The trust then attaches to the debt, not to any particular fund in the bank in which the trust money may have been placed or invested. *Little v. Chadwick*, 151 Mass., 109.
4. An assignee for the benefit of creditors, represents his assignor only to the extent of the character and amount of the assets received, and can only be made to restore the trust fund in full to the exclusion of other creditors when that trust has been traced into and identified in his hands.

**TYLER & APPERSON FOR THE APPELLEE.**

1. The New Farmers' Bank was in fact a trustee for the funds in controversy not only by express agreement, but also by impli-

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New Farmers Bank's Trustee v. Cockrell, Receiver.

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- cation from having come into possession of same with notice of their trust character. Beach on Trusts, secs. 98, 689.
2. If a trustee invests trust property or its proceeds in other property, it is optional with the *cestui que trust* whether he will follow the fund in the substituted property or hold the trustee personally responsible. Beach on Trusts, sec. 231.
  3. A trust fund can not be followed into the hands of a *bona fide* purchaser or holder for value without notice. Beach on Trusts, sec. 231.
  4. Appellant is the assignee of the New Farmers' Bank for creditor generally and is not a purchaser for value, but takes the estate "subject to all the infirmities of every character, to which it was subject while in the hands of the bank." Beach on Trusts, sec. 615; Story's Eq. Jur., sec. 1078; Corn v. Sims, 3 Met., 391; Bowles v. Bowles, 80 Ky., 529; Bank of Commerce v. Payne, 86 Ky., 446; Longdale Iron Co. v. Swift's I. & S. Works, 91 Ky., 191; Chenault, Recr., v. Bush, 84 Ky., 528.
  5. Although the relation between a bank and its depositor is that merely of a debtor and creditor, yet the funds when deposited in the bank by Mitchell being impressed with a trust they will remain subject to the same trust. Third Nat. Bk. v. Gas Co., 36 Minn., 75; Cen. Nat. Bk. v. Conn. Mut. Life Ins. Co., 104 U. S., 54.
  6. The bank received said funds with notice of their trust character and carried same on its books as such up to its assignment to appellant, which received the bank's estate impressed with the same trust, and with notice thereof. This is sufficient identification of the fund and it went into and constituted a part of the notes and bills and other assets of the bank on hand at the time of the assignment, and the bank's estate having been augmented by the amount of these trust funds, the *cestui que trusts* are entitled to have same paid by appellant out of it in preference to general creditors. Beach on Trusts, secs. 98, 230, 689, 700; U. S. v. Inhabitants of Waterborough, Davies, 154; Taylor v. Sir Thomas Plumer, 3 Maul & Selw., 562; Ellis v. Johnson, 4 Ky. Law Rep., 991; Bank v. Rice, 45 Pac., 515; Boyer Ind. School Dist. v. King, 80 Iowa, 497; Davenport Plow Co. v. Lamp, 80 Iowa, 722; Myers v. Board of Education, 51 Kan., 87; 37 Am. St. Rep., 263; Peak v. Ellicott, 30 Kan., 156; 46 Am. Rep., 90; McLeod v. Evans, 66 Wis., 40; 57 Am. Rep., 287; Harrison v. Smith, 83 Mo., 210; 53 Am. Rep., 571; Stoller v. Coates, 88 Mo., 514; Central Nat. Bk. v. Conn. Mut. L. Ins. Co., 104 U. S., 54.
  7. The trust asserted in the case at bar is upon a higher plane than an ordinary trust; being a fund in court it is still subject to the order of the chancellor. 20 Am. & Eng. Ency. of Law, pp. 11, 12, 14, 109, 110, 137.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

William Mitchell filed suit in the Montgomery Circuit Court against the appellant, alleging that he had been appointed by order of court in an action in said court of Anderson's administrator v. Annie Dooley and others, as trustee and receiver for the Hocker children; that a large fund had come into his hands, of which he had deposited two sums, aggregating nearly \$2,300, in the New Farmers' Bank, under an agreement that the bank should repay him, as such trustee and receiver, the amounts deposited, with interest; that said funds were deposited by him in his trust capacity, and were trust funds in the hands of the bank, and that he was entitled to be paid the amount of them in full before the general creditors of the bank; that the bank had made a general deed of assignment for the benefit of its creditors, and, the trustee thereby appointed having failed to qualify, the appellant was appointed by the court, and had qualified and acted as trustee; that he, Mitchell, was nominally acting as receiver and trustee of the Hocker children, but the bank was the real receiver and trustee.

A demurrer having been sustained to the petition, an amended petition was filed, alleging that, at the time of Mitchell's "appointment as such receiver, said bank was desirous of obtaining the funds which had thus come to his hand, and was willing to pay the aforesaid interest, thereon to obtain same as a deposit and at its instance and for its benefit plaintiff was induced and authorized to seek said appointment as receiver, and to qualify as such; plaintiff at that time being cashier or president of the said bank. Plaintiff states that from the time that said funds were deposited in said bank as aforesaid until its assignment to R. B. Young, who failed to

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New Farmers Bank's Trustee v. Cockrell, Receiver.

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qualify, they were recognized by said bank and its officers as trust funds, subject to the control of this court, and said bank as the real receiver and plaintiff as nominal receiver only; that said funds were, from the time of their deposit in said bank as aforesaid to its assignment, carried on its books to his respective accounts as trustee and receiver aforesaid, separate and distinct from all other accounts, and so remain to-day."

Mitchell having died, and appellee having been appointed in his place as receiver of the fund, the latter was substituted as plaintiff.

A demurrer to the petition as amended was overruled, and, appellant standing by its demurrer, it was adjudged that appellee should recover the amounts claimed, and that they were trust funds and preferred claims against the assets of the bank.

It is not necessary to consider whether there was inconsistent pleading in the petition; nor, in the view we take of the case, is it essential to decide whether, under the averments of the petition as amended, the bank was the real trustee of the fund, though it would seem that the averments as to the deposit, taken in connection with the agreement to pay interest, would make it a loan by Mitchell to the bank, the money being placed to his credit as trustee, and showing that the bank was indebted in that sum to the trust fund. (*Mills v. Swearingen*, 67 Tex., 270, [3 S. W., 268]). There is no averment indicating that the loan was in violation of the trust, and so known to be by the bank. On the contrary, the presumption from the averments is that Mitchell was authorized to make an investment or loan of the fund, so as to produce an income for his *cestuis que trustent*, and would have been derelict had he not done so.



But, assuming that, by virtue of the transaction stated in the petition as amended, the bank did become trustee, we shall consider the question whether this entitles the beneficial owners of the fund to subject the bank's assets to the payment of their claim, to the exclusion of the other creditors.

On behalf of appellee it is urged that it is unnecessary to trace the trust fund into the hands of the assignee, it being admitted by the demurrer that the bank received it with notice of the trust; that it thereby became in fact the trustee, and its assignee occupied no better position with reference to the fund than the bank did; that, having mingled this fund with its other money and used it in its regular business, the assets of the bank were thereby increased, and the *cestuis que trustent* were entitled to have their money refunded out of the assets in the hands of the assignee, to the exclusion of the general creditors. In support of this contention counsel relies upon Beach on Trusts and Trustees, section 689, where it is said:

"In a recent case [*Banks v. Rice* (Colo. App.), 45 Pac., 515] it was held that where one mingles money of another with his own, and then expends the fund thus created in his own business for different purposes, in some of which the money can not be traced, the law will presume such other's money—it being impossible to determine what proportion of it was used for each purpose—was all used for purposes in which it can be traced, and, when that purpose was the purchase of new stock for the business, the fact that the identity of the original stock was changed by sale and replenishment is immaterial, so long as the fund remains in the business." Beach on Trusts and Trustees, section 700, and a number of other cases, are cited in support of this view.

It is to be observed that in a number of these cases the trust fund was lent in violation of the trust, and without authority to make the loan, and with knowledge of that fact on the part of the borrower.

Especial reliance is placed upon the case of *Myers v. Board of Education*, 51 Kan., 87, [37 Am. St. R., 263; 32 Pac., 658]; a case almost exactly on all-fours with the case at bar, in which the treasurer of the school funds deposited them in a bank of which he was manager. The fund had been mingled with the funds of the bank, and used in paying its creditors. The bank assigned, and neither the money nor any specific property into which it had been converted could be clearly traced, in the hands of the assignee. The Kansas court after quoting *Story's Equity*, 1259, said:

"The modern doctrine of equity, and the one more in consonance with justice is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that when the funds are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the fund, they become a charge upon the entire assets with which they are mingled. . . . It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands, or other assets. As the estate was augmented by the conversion of the trust funds, no reason is seen under the equitable principles which have been mentioned, why they should not become a charge upon the entire estate."

Before proceeding to consider whether this doctrine is law in Kentucky, it may be said that it is conceded by appellant that, if the money could be traced, it, or property in which it had been invested, could be subjected to the payment of

appellee's claim. It is conceded by appellee that the actual money can not be traced, but it is contended that the fund is traceable by reason of the fact that it was carried upon the books of the bank to the credit of Mitchell as trustee. In this there seems to be some confusion. From the allegations of the petition we must conclude that the money (as in the Kansas case) was used by the bank in its regular business, lent to its customers, and used in paying its debts. The fact that the account stands upon the bank's books in favor of Mitchell as trustee does not in any way identify the fund which that account shows that the bank owed to Mitchell, trustee. The fund is not thereby identified, any more than it would be if Mitchell had used the money in his own business, expending it in ways which could not be traced, but charging it to himself upon his private books. Whatever that account could be made to produce would doubtless be subject to the trust, but the keeping of such an account does not in any way identify the fund.

As said by Judge Hines in *Taylor's Adm'r v. Taylor's Assignee*, 78 Ky., 471, quoting from *Williams v. Rogers*, 14 Bush, 788: "Whenever a deposit is made in a bank, the relation of debtor and creditor is established between the bank and the depositor, *the identity of the particular money is lost*, and the relation between the parties continues the same, whether it is an ordinary or time deposit."

If Mitchell had deposited the fund to his individual credit, the bank's indebtedness to him, or whatever could be collected from the bank upon that account, if the bank were insolvent, could be subjected to the claim of the beneficiaries, provided it could be shown that the indebtedness of the bank to Mitchell was

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New Farmers Bank's Trustee v. Cockrell, Receiver.

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created by the loan of their money; and so whatever is realized upon the claim of the trustee for the Hocker children can be subjected to the payment of their claim.

It is admitted by counsel for appellee that the general rule before the cases cited from Beach was as stated in Story, section 1259, as follows:

"The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description."

And see Perry on Trusts, section 841; Pomeroy's Equity Jurisprudence, 1058.

The three cases from Wisconsin which support the doctrine contended for by appellee have been overruled by the Supreme Court of that State in Nonotuck Silk Co. v. Flanders, [58 N. W., 383].

We have been cited to no Kentucky case changing the rule laid down in Story. Ellis v. Johnson, 4 Ky. Law Rep., 991, does not appear to do so. In that case it was held that the trust fund could be "distinctly traced," and from the abstract it would seem that it was invested in real estate.

In Beavan v. Citizens' National Bank, 19 Ky. L. R., 1261, [43 S. W., 242], it appeared that bank stock was taken by a guardian in her own name, and paid for by check upon her personal account, to the credit of which her individual money, as well as trust funds, was indiscriminately deposited; and the court held that the trust moneys had been so intermingled with her individual money that they could not be distinguished. Said the court, through Judge Burnam:

"To follow the money, however, and impress it with the

trusts, as against innocent third persons, it must be distinctly traced and clearly proven to have been invested in the security sought to be subjected; and if the trust fund has consisted of money, and has been mingled with other moneys of the trustee in one mass, undivided and undistinguishable, and the guardian has made investments generally from the money in his possession the *cestui que trust* can not claim specific lien upon the property or funds constituting the investment. Hill on Trustees, p. 522; Ferris v. Van Vechten, 73 N. Y., 118."

In King v. Noland, 20 Ky. Law Rep., 186, [45 S. W., 508], a trust fund of \$1,600 was distinctly traced as being invested in a house, the title to which was taken in the name of the trustee, and in a contest between the *cestui que trust* and an execution creditor it was held that, so far as that fund was concerned, the claim of the *cestui que trust* was superior to that of the creditor, but as to the remainder of the purchase money, which was paid by check upon her individual account, made up of her own funds and trust funds intermingled, the rights of the creditor were held to be superior.

Said the court in that case:

"If the trustee has appropriated it to his own use, and mingled it with other money belonging to him, so that it can not be distinguished from his own funds, and made investments from such common fund, creditors are entitled to subject the property as his, and the *cestui que trust* can have no specific lien upon either the property or the money so invested. (Hill on Trustees, 522; Beavan v. Citizens' National Bank, 19 Ky. L. R., 126, [43 S. W., 242])." And see Robinson v. Woodward, 20 Ky. L. R., 1142, [48 S. W., 1082]; and Woodring v. White, 12 Ky. Law Rep., 505.

In *Philadelphia National Bank v. Dowd*, 38 Fed. Rep., 173, commercial paper was indorsed to the bank of which Dowd became receiver, collected, and the proceeds mingled with other moneys of the bank, instead of being forwarded. An equitable lien was claimed on behalf of the Philadelphia bank. The court held that, when Dowd's bank mingled the money collected with its general funds, it was—if a breach of trust was committed thereby—a conversion of such money, and the plaintiff became a simple contract creditor, with no claim that had a preference at law over another simple contract debt. Said Seymour, J., delivering the opinion of the court in reference to a number of cases cited by appellee:

"I look upon these cases as introducing a new principle into the old and well-known doctrine of equity, which, with the greatest deference to the courts deciding them, I do not feel at liberty to follow, in advance of any adjudication by the Supreme Court."

A few months later the case of *Peters v. Bain*, 133 U. S., 670 (10 Sup. Ct., 354), was decided by the Supreme Court. In that case it appears by the syllabus that:

"The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver: Held, That the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank, as he might elect, but that purchases made and paid for out of the general mass could not be claimed by the receiver, unless it could be shown that the moneys

of the bank in the general fund at the time of the purchase were appropriated for that purpose."

Said Chief Justice Waite, deciding the case in the circuit court:

"The payments were all, so far as now appears, from the general fund then in possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put there. Purchases made and paid for out of the general mass can not be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that, when the property in this class was purchased, the firm had in its possession any of the moneys of the bank that could be reclaimed in specie. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds."

When the case was appealed, the Supreme Court, through Chief Justice Fuller, quoted the opinion of Mr. Justice Bradley in *Frelinghuysen v. Nugent*, 36 Fed. Rep., 229, 239.

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by ex-

change, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank.” The court then said:

“The same difficulty presents itself here, and while the rule laid down by Mr. Justice Bradley has been recognized and applied by this court (*Baltimore Cent. National Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S., 54, 67, and cases cited), yet, as stated by the Chief Justice, ‘purchases made and paid for out of the general mass can not be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.’”

The Supreme Court has, therefore, carried the doctrine further than it has been carried in any Kentucky case to which we have been cited. But the rule, even as there stated, does not sustain the contention of appellee. The same difficulty presents itself here. It does not appear by any averment that any of the trust fund was contained in the assets of the bank which came to the hands of the assignee.

The act of March, 1894, now in force, had not



been passed at the date of the bank's assignment, and does not, therefore, govern the distribution of the estate.

It follows, therefore, that the court erred in overruling the demurrer to the petition as amended, and the judgment is, therefore, reversed.

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CASE 72—ACTION ON LIFE INSURANCE POLICY—MAY 17.

Mutual Benefit Life Insurance Co. of Newark,  
N. J., The v. Dunn.

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APPEAL FROM LAW AND EQUITY DIVISION OF JEFFERSON CIRCUIT COURT.

1. **LIFE INSURANCE—NON-FORFEITURE CLAUSE**—"FULL AMOUNT INSURED BY THIS POLICY."—Where an insurance policy contains a non-forfeiture clause which provides that in the event the insured fails to pay his annual premium the reserve value of the policy and the dividend additions shall be applied as a single premium to carry the policy "for the full amount insured" for a term estimated at the company's published rates and in force at the date of the issue of the policy, the language "full amount insured" means the face of the policy, although the contract contained the stipulation that during the first ten years the uncollected dividends should buy additional insurance.
2. **SAME—ESTOPPEL**.—In the absence of a plea of estoppel the plaintiff will not be concluded by a different construction of the contract made by the insurance company and sent to the insured in his life-time, of which she had no knowledge.

DODD & DODD FOR THE APPELLANT.

1. What was the full amount of the policy sued on at the date of the lapse thereof?
2. The full amount of the policy sued on at the date of the lapse must be determined by the language of the non-forfeiture provision of the policy as follows: "When after two full annual premiums shall have been paid on this policy it shall cease or become void solely by the non-payment of any premium when due, the *entire* net reserve value of the policy and dividend additions, by the American experience mortality and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single prem-

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn

lum at the company's rates published and in force at this date, . . . First, to the purchase of non-participating term insurance for the full amount insured by this policy. . . . Note. The first ten years' dividends that may be declared upon this policy will be allowed only on the additional plan."

3. That the language of the non-forfeiture provisions of the policy should be construed and understood according to the common and approved usage of language. See *Bailey v. Com.*, 11 Bush, 688; *Williams v. Com.*, 78 Ky., 93; *Com. v. Hollidy*, 98 Ky., 618.
4. That what it would have cost the insurance company to have complied with its contract, had the insured died on the day the policy lapsed is, of necessity, the full amount insured by the policy on that date.
5. That the trial court's interpretation and construction of the policy sued on leads to an absurdity, and should for such reason be rejected.
6. That the language of the non-forfeiture provisions of the policy ought to be interpreted in such manner as that it may have effect and not be found vain and illusive.
7. That where the policy provides that "the first ten years' dividends that may be declared upon this policy will be allowed only on the additional plan," and dividends are declared on the policy before it lapses, it can not be said that there is no agreement or promise to pay dividend additions as a part of the amount insured by the policy.
8. The word "addition" means, and can only mean, increase, and there can not be an addition to without an increase of the sum insured.
9. When declared dividends are allowed on the "addition plan" they purchase, or are additional full-paid insurance, and necessarily increase the amount of the policy, and are not, and under the policy could not, be paid-up insurance. (See *Notes on Life Insurance* by Gustavus W. Smith (2d ed.), p. 112.)
10. Paid-up insurance is, and can not be anything other than a non-forfeitable, non-premium bearing certain sum payable in all events on a certain date, namely, the death of the insured.
11. Dividend additions on the policy sued on were, and are purchased additional participating current insurance, and by their allowance became an integral part of the current policy, and like the policy forfeitable for non-payment of premiums.
12. The appellee can not claim under and against the policy, and as appellant issued in accordance with a fair and reasonable interpretation of the provisions of its policy, a certificate extending the lapsed policy for her benefit for two years and two hundred and sixty-three days she is estopped from claiming otherwise than under the certificate so issued. *Hopkins v.*

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

Hopkins, 92 Ky., 327; Miles v. Conn. Mut. Life Ins. Co., 147 U. S., 177.

13. It is a sound principle of law that members of a purely mutual company are bound by the reasonable rules and regulations determined upon by the managing officers of such a company, and as the policy sued on was extended confessedly in conformity to an established and unvarying rule of the company, made by the policy holders through their representatives, it is binding on the members of the company and all who claim under or through them. Lake v. Minn. M. & R. Assn., 52 Am. St. Rep., 538.
14. There can be no vested right in a lapsed policy and the cases of Welsert v. Muehl, 81 Ky., 339; Manning v. Ancient O. U. W., 86 Ky., 139; and Hopkins v. Hopkins, 92 Ky., 327, in this respect are not applicable to the case at bar.
15. The well-established principle of law that "if the language of the policy is capable of two interpretations, that one must be adopted which is most favorable to the assured because the language used is that of the insurer," does not apply to this case, because the language of the non-forfeiture provisions of the policy sued on is not capable of two interpretations without disregarding the common and approved usage of language and making the same vain and illusive. Ky. Stats., sec. 460.

F. W. MORANCY FOR THE APPELLEE. (GRUBBS & MORANCY OF COUNSEL.)

1. An insurance policy may by failure to pay premiums die as current insurance, but still live as an agreement for paid-up insurance, whether for a term or for life. 14 Bush, 51; Montgomery v. Phoenix Mut. Life Co.; Mut. Life of N. Y. v. Jarboe, 19 Ky. Law Rep., 1501.
2. It is the universal rule of the courts that a policy of insurance must be construed most strongly against the insurer, and in favor of the assured.
3. Immediately upon the issue of a policy of insurance, the rights of the beneficiary become vested, and can not, during the existence of the contract, be changed, or affected at all by either the assured or the insuree, or both combined. Ky. Stats., sec. 654; 2 Joyes on Insurance, sec. 853; Welsert v. Muehl, 81 Ky., 339; Manning v. Ancient Order U. Workmen, 86 Ky., 136; Hopkins v. Hopkins, 92 Ky., 327.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee upon a policy of insurance issued by appellant upon the life of Benjamin C.

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

Dunn for the benefit of appellee, who was his wife. The policy was for \$5,000, the annual premium of \$165.80 being payable upon the 23d of March of each year, until twenty full years' premiums should be paid, or until the death of the insured. It contained a provision that, in case of non-payment of premium, the policy should cease and determine "subject to the provisions of the company's non-forfeiture system," as indorsed on the policy, with an accompanying table. One of the objects secured by the non-forfeiture system referred to was the right to extended insurance for a limited period "for the full amount insured by this policy," in case of lapse by non-payment of premium. The non-forfeiture provision now before us for construction, as indorsed upon the policy, is as follows:

"When, after two full annual premiums shall have been paid on this policy, it shall cease or become void solely by the non-payment of any premium when due, the entire net reserve value of the policy and dividend additions, by the American Experience Mortality, and interest at four per cent. yearly, less any indebtedness to the company on this policy, shall be applied by the company as a single premium at the company's rates published and in force at this date, either—First, to the purchase of non-participating term insurance *for the full amount insured by this policy*; or, second, upon the written application by the owner of this policy, and the surrender thereof to the company at Newark within three months from such non-payment of premium, to the purchase of a non-participating paid-up policy, payable at the time this policy would be payable if continued in force."

In a "Note" at the foot of the indorsement it is provided: "The first ten years' dividends that may be declared upon this policy will be allowed only

on the addition plan." That is to say, the dividends declared upon the policy were not to be paid in cash or credited upon the amount of the next premium, but, as contended for by counsel for appellant, were invested in additional insurance, fully paid for by such investment, without any premium chargeable thereon, but under the provisions of the policy, forfeitable by the non-payment of any premium to accrue on the policy, and in that respect differing from what is called "paid-up" insurance.

The pleadings and agreed statement of fact show that there is no dispute as to the following propositions:

(1) Only three premiums were paid, the last premium having been paid by money lent by the company to Dunn.

(2) The net reserve value of the policy was \$265.65.

(3) The dividend additions were \$163, and the net reserve thereon was \$55.98.

(4) The indebtedness of Dunn to the company was \$175.75.

(5) The net reserve value of the policy, together with the net reserve on the dividend additions, amounted after deducting such indebtedness, to \$145.88.

(6) The policy lapsed by non-payment of the premium due March 23, 1894.

(7) Dunn died December 19, 1896.

Appellant claims that the net reserve value should, by the terms of the contract, have been applied by the company to the purchase of non-participating term insurance for the sum of \$5,163, being the amount written in the face of the policy, plus the dividend additions up to the date of the lapse; because, it is claimed, that would have been the amount payable to the beneficiary had Dunn died just prior to the lapse, and was therefore "the full amount insured by this policy." The net reserve on policy and addi-

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

tions, \$145.88, would, it is conceded, purchase non-participating term insurance for \$5,163 for two years and two hundred and sixty-three days from March 23, 1894—that is, up to and until December 11, 1896—and such insurance would therefore expire eight days before Dunn's death.

Appellee claims that the net reserve should have been applied as a single premium to the purchase of non-participating term insurance for \$5,000, thereby extending the insurance period for that amount for the term of two years and two hundred and ninety-seven days from March 23, 1894—that is, up to January 14, 1897—twenty-six days after Dunn's death.

The question, therefore, is as to the construction of the words, "the full amount insured by this policy;" and this language should be construed and understood, according to counsel on both sides, according to the common and approved usage of language; and it seems to us that the language of the contract should be construed as of the date when it was entered into, and that such meaning be given to it as the parties may reasonably be supposed to have had in their minds at that time. That contract insured Dunn's life for \$5,000. That was the amount insured. No other amount was insured. It was agreed that *if* the company earned dividends, and *if* the directory declared them, they should, for ten years, be invested in the purchase of *additional* insurance. Additional to what? Additional to the sum of \$5,000 insured by the policy at the time the contract was entered into between the parties.

Said the trial judge, discussing this question upon demurrer to the reply:

"What was the full amount insured by the policy? Undoubtedly, the sum of \$5,000. Could

language be plainer? There is no agreement or promise to pay any dividend additions as a part of the amount insured by the policy. Such dividend additions might or might not be made, being wholly dependent upon the degree of success attendant upon the business done by the company, the management of its affairs, and the losses of said company, and also upon the discretion of the directory as to whether there should or should not be a declaration of dividends at all. I can not doubt that this is the proper interpretation and construction of the language used in the provision of the policy referred to; but, if I entertained any doubt upon the subject, then, under the well-recognized rule in the interpretation of policies, the demurrer would have to be overruled; for when words in a policy are, without violence, susceptible to two interpretations, that interpretation will be adopted which will sustain the claim and cover the loss, in preference to that which will defeat the claim. May on Insurance, 1175.

"Bliss, in his excellent work on Life Insurance (section 40), says: 'If it be uncertain, in view of the general terms of an instrument and the apparent object of the parties, whether given words were used in an enlarged or restricted sense, other things being equal, that construction should be adopted which is most beneficial to the promisee. . . . If the language of the policy is capable of two interpretations; that one must be adopted which is most favorable to the assured, because the language used is that of the insurer.'"

It is agreed that, under the form of the policy sued on, the company has always and without an exception, considered and treated the dividend additions as a part of the full amount insured, under said form of policies.

It is further agreed that, about a month before

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

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the lapse, Dunn made inquiry of the State agent as to what would be the cash surrender value of the policy, and was given the information. In February, 1895, he made inquiry through the local agent, as to what was the cash surrender value and what the extension of time upon the policy. To this inquiry the company responded that it would not, at that late date, be willing to allow any value for the policy, except in the form of extended insurance, and forwarded an extension-certificate for \$5,163 for two years and two hundred and sixty-three days from the date of the lapse, being until December 11, 1896, together with the canceled premium-loan certificate. This extension-certificate was delivered to Dunn, and found among his papers after his death.

It is claimed that the appellee is estopped "by the action of the company in issuing, without protest or objection from plaintiff, a certificate of extended insurance extending the lapsed policy on the life of Benjamin C. Dunn for the benefit of plaintiff for two years and two hundred and sixty-three days from the date of the lapse thereof by non-payment of premiums." Counsel for appellant recognizes "the law as established in the cases of *Weisert v. Muehl*, 81 Ky., 339; *Manning v. Ancient O. U. W.*, 86 Ky., 139 [9 Am. St. R., 270, 5 S. W., 385], and *Hopkins v. Hopkins' Adm'r*, 92 Ky., 327 [17 S. W., 864], that the general rule is that the right to a policy of insurance, and the money to become due under it, vests, immediately upon its issuance, in the person named in it as the beneficiary, and that this interest, being vested, can not be transferred by the insured to another person." But counsel claims that these authorities do not apply to the case at bar, for the reason that no vested interest of the



appellee was attempted to be divested by the issuance of the extension-certificate, and that it was issued in compliance with the terms of the conditional contract of insurance. It is urged also that the appellee is in the attitude of claiming a vested right in a lapsed policy.

It is true that the policy had lapsed as to current insurance, but, by virtue of that lapse, the non-forfeiture proviso became operative, as the sole contract of insurance and the wife, who was the beneficiary named in the policy had a vested interest in the policy as then existing.

Upon the question of estoppel also. we concur with the opinion of the trial judge:

"An estoppel, to be effective, must be pleaded. The pleadings in this case do not allege any facts constituting an estoppel: there is no allegation charging that plaintiff had any knowledge of, or was ever informed of, any correspondence, or of the result of any correspondence, between her husband and the company, or the company's agents, with respect to the policy sued on; nor is there any allegation in the pleadings that Benjamin C. Dunn was the agent, or acting as the agent, of his wife, the plaintiff, in the correspondence with the company, or in receiving the certificate of extended term insurance.

"In the case of *Miles v. Connecticut Mutual Life Insurance Co.*, 147 U. S. 177, [13 Sup. Ct., 275], the insured, Mr. Miles, in the course of his negotiations with the company, acted as the agent for his wife, and was treated with by the company as such agent. Not being able to pay a premium about to become due, Mr. Miles wished to give up a policy for \$5,000, and take a paid-up policy. He was advised by the company that a plan more beneficial would be to have so much of the

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

\$5,000 released as would enable him, with the sum allowed by the company for such release, to pay what would be due as a premium on the remaining sum under the policy. The necessary calculations being made, Mr. Miles 'procured from the company the requisite papers for the signature of his wife, and afterwards delivered such papers to the company, with her name purporting to be signed to a receipt.' Afterwards, Mr. Miles, not being able to pay the premium upon the policy as reduced, again visited the office of the company, and insisted upon taking out a paid-up policy, and he was given the requisite receipt, to procure the signature of his wife to it, and returned it to the company, with what purported to be her signature.' . . . 'Mrs. Miles testified that her name in both receipts had been written by her husband without her assent, but it also appeared that her name to the application for the \$5,000 policy was written by him, and that in his dealings with two other insurance companies he had signed her name.'

"In the present case the application for insurance was made by Benjamin C. Dunn, as appears from a copy of the application filed with the policy. In the present case it does not appear, from the agreed facts, that Mr. Dunn was acting as the agent of his wife, nor does it appear that the company treated with him as such in the correspondence concerning the policy, or in issuing a certificate of extended term-insurance. By the agreed statement of facts, it appears that Mr. Dunn, on February 20, 1894, wrote to the company's agents asking, 'What will be cash surrender value of policy No. 166,881, when the fourth premium has been paid, due March 23d, 1894?' The letter referred to does not in any way intimate that Mr. Dunn was acting for his wife in making the inquiry. Afterwards, February 6 1895, Mr. Dunn.

Mutual Benefit Life Insurance Co. of Newark, N. J., The, v. Dunn.

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through a special agent of the defendant, inquired 'as to what was the cash value of *his* policy at that time, and what were *his* rights as to Extension Insurance.' The answers to these letters never mention Mrs. Dunn as the owner of the policy, nor refer to Mr. Dunn as being the agent for his wife. The company, in its letter of February 12, 1895, to its agents, after referring to the lapse of the policy, the application of the policy reserve to the cancellation of the premium loan and to the extension of the insurance, says: 'We inclose extension certificate 205,544, and canceled premium loan certificate, which you will please forward to Mr. Dunn.' It further appears from the agreed statement of facts that the certificate of extended insurance was 'delivered to Benjamin C. Dunn, and was kept by him until his death, and was found by plaintiff among his papers after his death.' It does not appear that plaintiff had any knowledge of the existence of this certificate of extended insurance until she found it among her husband's papers, after his death.

"It is true, as contended by defendant's counsel, that 'no surrender of the policy was necessary, nor was the consent of the beneficiary required by the policy as a condition to granting extended insurance;' but by the very terms of the policy itself, after two full annual premiums have been paid, the insured had a vested right (in the absence of an application for a paid-up policy by the owner of the policy upon the terms and within the time specified in the non-forfeiture provision of the policy) to have the net reserve value of the policy and dividend additions applied by the company (and it is the contract-duty of the company so to do) as a single premium to the purchase of non-participating term insurance. It is agreed as a fact that the defendant company 'has always,

and without an exception, under the form of the policy sued on, considered and treated the dividend additions as a part of the full amount insured under said form of policies; and defendant's counsel argue that 'any other construction would not be fair to a policy holder.' The question to be determined in this case is not, what would be fair to a policy holder, but what is the true construction of the contract. In construing a contract, a court will not adopt the interpretation placed upon it by one of the parties to it, unless such interpretation be obviously proper, no matter how often or how uniformly has been such interpretation of similar contracts. In this case it is not alleged in the pleadings, and it does not appear from any of the agreed statement of facts, that plaintiff was ever informed of the construction placed by the company upon the provisions of the policy now in question.

"From the pleadings and the proof (agreed facts) I am of the opinion that the plaintiff is not estopped from denying that such construction was ever assented to or recognized by her as binding upon her, and, there being no estoppel, plaintiff has the right to repudiate the construction placed by the company upon the provision in question, and come into court and demand that the court construe the contract."

The judgment is affirmed, with damages.

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CASE 73—INDICTMENT—MAY 17.

### Mitchell v. Commonwealth.

APPEAL FROM LAUREL CIRCUIT COURT.

1. SALE OF INTOXICATING LIQUORS—JAMAICA GINGER.—(a) Proof that Jamaica ginger contains ninety-six per cent. alcohol and four per cent. ginger is sufficient to show that it is an intoxicating and spirituous liquor; but (b) it is a matter of common knowl-

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Mitchell v. Commonwealth.

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edge and needs no proof that it is an intoxicating and spirituous liquor.

2. **CRIMINAL LAW—VERDICT.**—A verdict, "Wee the jury agree and find the defendant guilty as charged in the indite and sess his fined at 100 dollars. Isaa Clouse," is sufficient to base a judgment on.
3. **SAME—INDICTMENT—COUNTY.**—An indictment will not be invalidated by a misnomer of the county in the caption, the county being properly set out in the body of the indictment.

**EWELL & SMITH AND A. L. REED FOR THE APPELLANT.**

1. Proof of sale of Jamaica ginger under an indictment for selling spirituous, vinous and malt liquors and the mixtures thereof is a variance.
2. The Jamaica ginger sold in this case is a patent medicine and if it is a legal possibility to convict for a sale of a vial of said ginger, then under the law it certainly could not have been under the charge of the indictment in this case.
3. There was no evidence to warrant a conviction.
4. The misnomer of the county was fatal.
5. The verdict was a nullity.

(The other points discussed by counsel are made immaterial by the opinion of the court.)

**W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR APPELLEE.**

1. Jamaica ginger when sold as a beverage is an intoxicating liquor within the meaning of the statute.
2. The verdict while a mutilation of the English language is intelligible and therefore sufficient to base a judgment on.

Citations: Acts 1883-4, vol. 1, p. 1116; 43 Ark., 151; 11 Am. & Eng. Ency. of Law, art. 1, sec. 3; Ky. Stats., sec. 2570; Thompson on Trials, vol. 2, sec. 2644; Com. v. Major, 1 Met., 368; White v. Com., 9 Bush, 179; Young v. Com., 12 Bush, 244.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

Appellant was convicted of the offense of selling intoxicating liquors in violation of a special act applicable to Laurel and four other counties. The sole proof was of a phial of Jamaica ginger, White's brand. It is claimed that this was a variance. It was not a variance, if Jamaica ginger was a spirituous liquor. The jury found that it was. But the objection is urged that there was no evidence

to support this finding, as both the vendor and vendee swore it was not intoxicating. Evidence of a druggist was introduced that the regulation requirement of Jamaica ginger was 96 per cent. alcohol and 4 per cent. ginger. If the jury believe this testimony, and believed that the phial contained Jamaica ginger (and it was bought and sold as such), they were authorized to conclude that it was intoxicating. Moreover, we think that, without the druggist's evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whiskey.

The verdict of the jury was as follows: "*Wee the jury, agree and find the defendant guilty as charged in the indite and sess his find at \$100 dollars. Issa Clouse.*" It is objected that this is no verdict. But we think it expresses—though only phonetically—the intention of the jury so that no one could be misaken in regard to it.

The remaining objections to the procedure, with one exception, have been passed upon in *Thompson v. Com.* 20 Ky., L. R., 397, [45 S. W., 1039; 46 S. W., 492, 698], adversely to appellant's contention.

The final objection is that the caption of the indictment is headed "Liquor Circuit Court," and that, as this court judicially knows there is no such court, there was legally no indictment. Anciently, at common law, it was the custom to write the name of the county on the margin, either with or without the addition of the word "scilicet." The omission of this, however, was not fatal, when the caption or the body of the indictment showed the county. Neither the caption nor the commencement is, strictly speaking, a part of the indictment, though part of the record (*Bishop's New Crim. Proc.*, sec. 603, *et seq.*); and while, in courts of limited or inferior jurisdiction, it is necessary that the facts

District of Clifton, Campbell County, v. Schneider, &c.

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necessary to give such courts jurisdiction should appear in the caption or commencement, the Laurel Circuit Court being a court of superior jurisdiction, it is not essential for the jurisdictional facts to appear in the caption. The commencement shows the indictment to have been found by the grand jurors of Laurel county, the indorsement of the clerk and the order of the court show it to have been returned in the Laurel Circuit Court, in which court the appellant was tried and convicted. The error in the caption, under the circumstances, must be considered immaterial, and the judgment is affirmed.

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CASE 74—ENFORCEMENT OF STREET ASSESSMENT—MAY 17.

District of Clifton, Campbell County v. Schneider,  
Etc.

APPEAL FROM CAMPBELL CIRCUIT COURT.

**STREET IMPROVEMENTS—ENFORCEMENT WHERE INSTALLMENTS NOT ALL DUE**—Section 694, sub-section 3, of the Civil Code, which provides that no sale shall be made of indivisible property until all the liens thereon mature is not applicable to street assessments properly imposed and payable in annual installments.

**C. L. RAISON, JR., FOR APPELLANT.**

1. The district of Clifton has a lien on the property fronting and abutting on streets improved by the district, under its charter, and has a right to enforce its lien for unpaid street assessments, and to sell the property, for the assessments, due and unpaid, and for the balance of the principal of the street assessment not due, but which are secured by the lien upon the property. Charter of District of Clifton, sec. 7.
2. The action should not have been dismissed absolutely, but without prejudice if dismissed at all.
3. The judgment of the court in dismissing the case absolutely would be a bar to any future action for the same street assessments. *Woolley v. Lou. Banking Co.*, 81 Ky., 527; *Thomas v. Bland*, 91 Ky., 1; and the court erred in dismissing the case.
4. The case was submitted for judgment by default, no answer or

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District of Clifton, Campbell County, v. Schneider, &c.

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demurrer being filed by the defendants. If the petition was defective the submission should have been set aside and leave given plaintiff to amend. Civil Code, secs. 94, 134.

5. The district of Clifton has a right to collect interest on each year's street assessment tax bill, principal and interest, if not paid before or on the first day of November of each year. Charter of District of Clifton.

Citations: *Faught v. Henry*, 13 Bush, 471; *Leopold v. Furber*, 84 Ky., 214; *Gentry v. Walker*, 93 Ky., 405.

**SIMMONS & BAILEY FOR APPELLEES.**

1. Where a lien is for debts partly due and some of which are not due, and the land is indivisible, no sale can be had to enforce the lien until the last installment is due. Civil Code, sec. 694, sub-sec. 3; *Faught v. Henry*, 13 Bush, 474; *Leopold v. Furber*, 84 Ky., 214.
2. A municipal charter must be strictly construed. *Henderson v. Covington*, 14 Bush, 312; *Trustees of Bellevue v. Hahn*, 82 Ky., 1; *Eason v. Trustees of Lancaster*, 12 Ky. Law Rep., 798; *Patton v. Stephens*, 14 Bush, 324; Charter of the District of Clifton, sec. 7; Acts of 1887-8, vol. 1, p. 255.
3. A personal judgment can not be had for street assessments. *Meyer v. City of Covington*, 20 Ky. Law Rep., 239.
4. Double interest can not be collected on deferred installments of street assessments.

**JUDGE WHITE DELIVERED THE OPINION OF THE COURT.**

The appellant was created a taxing district or corporation authorized to contract for and have constructed certain street improvements, the cost thereof to be paid by the owners of property abutting thereon, to be paid, however, in ten equal installments, together with interest, payable annually, and for the costs of this street construction a lien was given on the abutting property.

The work was done, and all steps necessary under the act done to charge the property. The annual payments for the years 1895, 1896, 1897 and 1898 not being paid, this action was brought to enforce the lien and for a sale of the property to satisfy same.

The case was submitted on the petition alone, and the lower court rendered judgment dismissing the peti-



tion, for the reason, as stated, the action to enforce the lien could not be maintained till all the liens fell due, under subsection 3, section 694 of Civil Code. From that judgment, this appeal is prosecuted.

There being no answer, every fact stated in the petition is taken as true by confession, and the only question presented is, can a foreclosure of the liens for improvement be had till all are due?

This is not made a personal obligation, and a personal judgment could not be rendered therefor. The only remedy is a sale of the property to pay this assessment.

The property sought to be subjected are lots in a city, each about twenty-five feet in width, with a separate amount against each lot. It therefore follows that the property is not susceptible of division.

It is insisted by appellees that the judgment of the lower court should be affirmed, as subsection 3 of section 694 of the Civil Code provides that no sale of indivisible property shall be made till all debts that are a lien thereon are due.

We are of opinion that that section of the Code has no application to this case. The act under which this charge against this property was authorized and created does not authorize a personal judgment against the owner, but makes the amount of this assessment due to the appellant, and payable in annual installments, and is made a direct charge on the lots fronting on the improvement. This is not a debt due by appellees. No judgment could be rendered against them for the amount of the whole or of any annual assessment. It is a charge on the land, yet it was not provided or intended that all should be paid in any one year. It was evidently the intention of the Legislature to charge this property, abutting the

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Board of Council of Danville v. Fiscal Court of Boyle County.

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improvement, with an annual tax for the payment of the cost of the improvement. We are of opinion that the annual assessment, as here sought to be collected is but a special tax on the property, and that, like other liens for taxes, may be sold for all past-due amounts, regardless of the fact that in each year, as long as it exists, a similar charge will come and be a like lien on the property. There should evidently, be but one sale for all past-due sums, but this would not exhaust the lien for the future years, no more than a sale by a sheriff for taxes would forever exempt that property for tax liens. The amounts of this special tax that is not due and included in the judgment of sale would still be a lien on the property, and for such sums unpaid the property could be again subjected to sale, in the hands of any person, like any other tax. The material difference between this and ordinary taxation is that this exists only ten years, and for a sum fixed per year, while taxes go on forever, and vary in amounts. For the reasons indicated, the judgment dismissing the petition is reversed, and cause remanded to overrule the demurrer to petition and for proceedings consistent herewith.

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CASE 75—MANDAMUS—MAY 18.

Board of Council of Danville, v. Fiscal Court of  
Boyle County.

APPEAL FROM BOYLE CIRCUIT COURT.

COUNTIES—DUTY AS TO PUBLIC WAYS WITHIN A CITY.—Where a county under the act of March 17, 1896, acquires a turnpike lying partly within a municipality, so much of the road as is so situated comes immediately within the control of the municipality, and it is the latter's duty to maintain it.

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Board of Council of Danville v. Fiscal Court of Boyle County.

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**G. C. FOX FOR THE APPELLANT.**

## Questions discussed:

1. The duty of the fiscal court of Boyle county to keep in repair all turnpike roads bought by it under Act of 1898, although a part of said roads lies within the corporate limits of Danville, and the right of said court to abandon the portions of said turnpikes lying in said city.

2. The right of the corporation of the city of Danville to a mandamus to compel said fiscal court to discharge said duty as to the portions of the turnpikes owned by it that lie in the city.  
Citations: 24 Am. & Eng. Ency. of Law, 120; 26 L. R. A., 663; 3 Met., 494; 2 Met., 65; 18 B. Mon., 350; 13 Bush, 336; Civil Code, section 477; 4 Ky. Law Rep., 727; 9 Ky. Law Rep., 352; 10 Ky. Law Rep., 844; 17 Ky. Law Rep., 574; 3 Met., 490; 7 B. Mon., 38; 11 Bush, 554; Acts 1896, sec. 6, pp. 39-41.

**CHARLES H. RODES ON THE SAME SIDE.**

The act of 1896 imposes on the county courts the imperative duty of maintaining all the roads which the act authorizes it to purchase and not simply so much of those roads as lie outside the territorial limits of a municipality.

Citations: Session Acts, 1896, p. 39; Cassidy v. Young, 92 Ky., 227; Ohio County Court v. Newton, 79 Ky., 267; Dickens v. Cave Hill Cemetery Co., 93 Ky., 385; Hammar v. City of Covington, 3 Met., 494.

**ROBT. HARDING FOR THE APPELLEE.**

1. The lower court had power by mandamus to require the appellee to keep in repair the streets and road-ways of the city of Danville described in the petition.
2. The lower court had power by mandamus to prescribe the way and manner in which the road-ways referred to should be kept in repair by the Boyle fiscal court.
3. The appellee is required by law to keep in repair for public travel the road-ways aforesaid in the town of Danville, which is a city of the fourth class.

Citations: 17 Ky. Law Rep., 1313; Ky. Stats., secs. 3560, 3565, 4283, 4308; Acts 1896, sec. 6, p. 41; sec. 3579—fourth class city charters.

**CHARLES C. FOX AND CHARLES H. RODES FOR APPELLANT IN A PETITION FOR A REHEARING.****JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

Under the act entitled "An act to provide free turnpikes and gravel roads," approved March 17, 1896 (see Carroll's

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Board of Council of Danville v. Fiscal Court of Boyle County.

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Ky. Stats., pp. 1605-1609, section 4748B), the fiscal court of Boyle county purchased certain turnpike roads in that county. A part of the roads so purchased lay within the corporate limits of the city of Danville, and had been kept up by the turnpike companies to the width of eighteen feet, without expense to the city, up to the time of their purchase, although used as streets of the city. The city insists that the fiscal court should still continue to keep up the portion of the turnpikes so purchased within the city limits just as the previous owners had done. The fiscal court, on the other hand, insists that the roads so purchased, in so far as they lie within the city limits, are streets of the city, and must be kept up by it. The parties being unable to agree upon their respective rights, this action was instituted to have them judicially determined. The lower court having decided in favor of the fiscal court, the city has appealed.

The question involves the proper construction, not only of the statute referred to, but of the other statutes in force at the time it was enacted, and with reference to which it was passed. At the time of the enactment of the statute the Legislature had provided a system for the working and keeping in order of the public highways. Besides the ordinary public highways, there were a great many toll pikes in the State, and there was a general demand that these toll pikes should be made free. With this view section 1 of the statute provides for the holding of an election to take the sense of the qualified voters of the county upon the proposition to have free turnpikes; sections 2, 3 and 4 specify how this election is to be held; and section 5 provides that, if the vote is in favor of the proposition, the fiscal court may acquire all the turnpike roads in the county on the best terms consistent with public interest, and may provide for the construction of new turn-

piques when the public good demands it. Section 6 then provides:

"All turnpike and gravel roads thus acquired or constructed shall become public roads and shall be maintained and kept in repair by and through the provisions of the fiscal court. Said court may provide for keeping them up as is directed and permitted under the general road law, or it may adopt other rules for the maintenance, repair and management of the same. But said roads shall be free of toll to the traveling public."

The mode of keeping up the roads under the general road law is given in sections 4306-4308 of the Kentucky Statutes. By section 4306 it is declared: "The fiscal court of each county shall have general charge and supervision of the public roads and bridges therein, and shall prescribe necessary rules and regulations for repairing and keeping the same in order and for the proper management of all roads and bridges in said county. . . . The public roads shall be maintained either by taxation or by hands allotted to work thereon, or both, in the discretion of the fiscal court;" by section 4307 the limit of tax to be levied is given, and by section 4308 the mode of working the roads is prescribed. Section 3579, Kentucky Statutes, exempts every citizen of the city from working on the public roads, so that, construing this section in connection with section 4308, the latter section must be held only to apply to citizens of the county not living within the city.

Thus it will be seen that one of the ways of keeping in repair the roads purchased under the act is by the labor of the citizens liable to work on the roads, and the fiscal court, in its discretion, may follow this method without levying any taxes for this purpose. But the citizens of the county are only to work the county roads, and it would

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Board of Council of Danville v. Fiscal Court of Boyle County.

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hardly be contended that it was contemplated by the Legislature, when it passed the act referred to, that the citizens of the county at large were to come within the corporate limits of the city, and work the city streets, when the citizens of the city were exempted.

Besides, by section 3560 of the Kentucky Statutes, governing the class of cities to which Danville belongs, it is enacted:

"Public ways as used in this act shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and the same shall be under the exclusive management and control of the city, with powers to improve them by original construction, or to reconstruct them, as may be prescribed by ordinance."

Section 3565 further provides:

"The cost of reconstructing public ways, streets, or alleys, or repairing of the same and the cost of making footway crossings, shall be borne exclusively by the city."

By section 4306, above quoted, the fiscal court has general charge and supervision of the roads which it is required to maintain, and by section 3560 the city is given exclusive management and control of all public ways within the city. Similar provisions are found in the laws regulating other classes of cities. In passing the statute referred to, the Legislature could not have contemplated that both the fiscal court and the city should have control of that part of the pike lying within the city. Construing all these statutory provisions together, we think they mean simply that the turnpikes, when purchased by the fiscal court, become public highways; the part lying within the city, being a public way, should be controlled by the city, and the part without the city, falling within the fiscal court's jurisdiction should be controlled by it.

Any other construction would create great confusion.

To illustrate: Suppose the fiscal court undertook to keep the pike in repair, and, after it had fixed it as it thought best, the city council should conclude that the interests of the city required it should be fixed differently; it is very clear that, if the fiscal court has the power of control, it could require the city council to leave the way as it had fixed it, however much this might be to the detriment of the city. The city might require a vitrified brick pavement or a smooth asphalt, when the fiscal court might think that rough cobblestones were much to be preferred.

Or, again, suppose the boundary of the city as now located includes no part of one of these pikes, and it should be extended so as to take in a mile of it ten years from now; why should the mile of pike so taken in stand differently from any other county highway taken into the city by the extension of the boundary? Or, if a new town should be located on one of these turnpikes twenty years from now why should not the part of the turnpike in the town used as a street stand just as any other county highway taken in its boundary?

It is hard to believe the Legislature contemplated that the pikes purchased under this act should stand differently from other highways. Such a construction would destroy the uniformity of our road system. It would take away from the towns and cities of the State powers absolutely essential to their well being, and impose on the fiscal court a duty it should never be called upon to discharge. The words of the act, that the turnpikes and gravel roads thus acquired or constructed "shall be maintained and kept in repair by and through the provisions of the fiscal court," must be read in connection with the other words of the act making them public roads, and directing that the fiscal court may keep them up under the general road law.

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Board of Council of Danville v. Fiscal Court of Boyle County.

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Thus construed, it is manifest that the Legislature intended the roads so purchased to be public highways, and that the duty of the fiscal court as to keeping them in repair is to be measured by the other statutes in force at the time, defining very clearly its jurisdiction, and committing to the city all that part of the public ways lying within its boundary.

The learned counsel insists that, as the statute expressly says that the turnpikes so acquired shall be maintained by the fiscal court, for this court to rule otherwise is for it to assume the powers of the legislative branch of the government. But the rule is elementary that the construction of a statute must be reasonable. Thus, in the old case where the statute forbade the drawing of blood in the street, it was held that a physician who bled a patient in the street, of necessity, to save his life, was not guilty, although within the words of the act. There is another elementary rule, equally imperative, that statutes *in pari materia* must be construed together, and that the legislative intention apparent from the whole body of the enactments must be carried into effect. Under these rules, the expression relied on for appellant can not be detached from its connection, and, though general in its character, is to be read as part of the system of law regulating the highways of the State. It is true the words of a statute are to be given controlling effect in determining the legislative intention; but an isolated, general expression, where it is clear the Legislature had not this in mind, will not be construed to set aside a settled legislative purpose clearly expressed in a number of other carefully drawn enactments.

Judgment affirmed. Whole court sitting.



CASE 76—INJUNCTION—MAY 18.

## Joyes v. Jefferson County Fiscal Court, Etc.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

**FISCAL COURT OF JEFFERSON COUNTY—HOW COMPOSED.**—The fiscal court of Jefferson county is composed of the county judge and the eight justices of the peace of the county, the act of April 6, 1888, providing for commissioners having been repealed—if not by section 144 of the Constitution, certainly by the act of October 17, 1892, enacted to carry that section into effect.

**MORTON JOYES IN A BRIEF AND SUPPLEMENTAL BRIEF FOR THE APPELLANT, JOYES.**

1. The city of Louisville is separated by law for county governmental purposes from the remainder of Jefferson county. Sec. 2744 Ky. Stats.
2. Section 144 permits such separation, either continuing from the past or to be created in the future.
3. Section 144 of the Constitution permits the General Assembly to limit the jurisdiction of the fiscal court in a county such as Jefferson, containing a city separated, etc., to that part of the county outside of the city, and to limit the membership of such a court to the county judge and the justices from that part of the county.
4. The inhibition upon local legislation contained in section 59 of the Constitution is prospective and not retrospective. *Pearce v. Mason County*, 99 Ky., 357; *Picot v. Police Jury, &c.*, 6 Southern, 677; *Ex parte, Burke*, 59 Cal., 6; *Nevada School District v. Shoecraft*, 26 Pac., 211; *Allbyer v. State*, 10 Ohio St., 588; *State v. Barbee*, 3 Ind., 258; *Cooley's Con. Lim.*, 76, and authorities cited.
5. The local act of April 6, 1888, establishing a board of commissioners for Jefferson county is not repealed, either by Constitution or the statutes. *O'Mahoney v. Bullock*, 97 Ky., 774; *Pearce v. Mason County*, 99 Ky., 357; *Nienaber v. Tarvin*, 20 Ky. Law Rep., 455; *Donnelley v. Carpenter*, 20 Ky. Law Rep., 675; *Campbell Co. v. Commissioners*, 19 Ky. Law Rep., 860.
6. Such commissioners are not officers within the meaning of section 165 of the Constitution. *McArthur v. Nelson*, 81 Ky., 68; *Goodloe v. Fox*, 96 Ky., 627.
7. This board alone has authority to purchase ground for an ad-

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Joyes v. Jefferson County Fiscal Court, &c.

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dition to the court-house of Jefferson county, and to contract for the construction of the same. Act of April 6, 1888.

8. The fiscal court of Jefferson county consists only of the county judge and four justices outside of the city, and has no authority to levy a tax for any purpose upon property or persons within the city of Louisville. Ky. Stats., sec. 1851.

Additional citations: *Piper v. Gunther*, 95 Ky., 115; *Con. secs.* 144, 150, 165, 59, 50; *Debates Constitutional Convention*, vol. 4, pp. 57, 48-9; *Ky. Stats.*, ch. 52; *Acts 1879-80*, vol. 1, p. 504; *Cooley on Taxation*, p. 113; *County Judge Shelby Co. v. Shelby R. R.*, 5 Bush, 225; *Malchus v. District of Highlands*, 4 Bush, 547; *State v. Barbee*, 3 Ind., 258.

H. L. STONE FOR APPELLANT, CITY OF LOUISVILLE.

1. For county governmental purposes the city of Louisville is separated by law from the remainder of Jefferson county.
2. The territorial limits of the jurisdiction of the fiscal court in Jefferson county are confined to that part of the county outside of the city of Louisville.

Citations: *Acts 1887-8*, vol. 1, pp. 831-33; *Con.*, secs. 144, 171; *Ky. Stats.*, secs. 1847, 1838, 1851, 1852, 1885, 1886, 1893, 2744, 2750, 2981; *Acts 1891-2-3* pp. 268-274; *Ky. Stats.*, secs. 1833-1851; *Ky. Stats.*, secs. 1852-1885; *Debates Con. Convention*, vol. 4, p. 5748; *Ib.*, 5749; *Endlich on Interpretation of Statutes*, sec. 510; *Com. v. Balph*, 111 Pa. St., 365-80; *Acts 1853-4*, vol. 1, p. 61; *Acts 1863-4*, p. 23; *Acts 1865*, vol. 1, p. 270; *Burnett's City Code*, title "County Relations," sec. 3, p. 175; *Ib.*, secs. 9, 10, 11, 12; *Acts 1889-90*, vol. 1, secs. 1, 2, p. 448; *Donnelly, Tax Collector v. Carpenter, &c.*, 20 Ky. Law Rep., 675.

JACOB SOLLINGER FOR SAME APPELLANT.

1. The proviso, "But where, for county governmental purposes, a city is by law separated from the remainder of the county, such commissioners may be elected from the part of the county outside of such city," in section 144 of the Constitution, contemplates and applies to fiscal courts, whether they be constituted of magistrates or commissioners, and is prospective in its operation.
2. Section 1851 of the Kentucky Statutes is in harmony with, and within the spirit of section 144 of the Kentucky Constitution, and is valid.
3. The city of Louisville is now, and has been for years prior to the adoption of the present Constitution, separated by law from the remainder of Jefferson county for county governmental purposes. *Burnett's City Code*, 174-179; *Ky. Stats.*, sec. 2744.

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Joyes v. Jefferson County Fiscal Court, &c.

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4. The jurisdiction of the fiscal court of Jefferson county does not extend over the city of Louisville. Ky. Con., sec. 144; Ky. Stats., secs. 1833 to 1851.

Additional citations: Ky. Con., secs. 142, 99; Debates Con. Convention, vol. 4, 5749; Cooley's Con. Lim. (2d ed.), 63; Cooley's Con. Lim. (6th ed.), 216, 217; Green, &c., v. Com., 95 Ky., 233.

HUMPHREY & DAVIE FOR APPELLEES.

1. The "Board of County Commissioners" for Jefferson county, created under the act of 1838, was necessarily superseded by the subsequent provisions of the new Constitution and the Kentucky Statutes; which created a fiscal court to perform the same duties formerly required of that board of commissioners. Con. sec. 144; Ky. Stats., chap. on fiscal courts; Black on Interpretation of Laws, p. 114; Endlich on Interpretation of Statutes, secs. 200, 201; N. Canal Co. case, 10 Watts, 351; Springfield v. Com., 6 Pickering, 501; Hatfield's case, 4 Yeates, 392; N. London v. Boston Railroad, 102 Mass., 388; Korah v. Ottawa, 32 Ill., 121; Gorham v. Lockett, 6 B. M., 154; Comrs. of Sinking Fund v. Grainger, 98 Ky., 324; Brown v. Com., 98 Ky., 652; McTigue v. Com., 99 Ky., 72; Broadus v. Broadus, 10 Bush, 299; Parrish v. Ferguson, 83 Ky., 19; Long, Treasurer, v. Stone, 19 Ky. Law Rep., 246.
2. That board of commissioners of 1838 was expressly repealed by the Kentucky Statutes. (Sec. 1833.)
3. That board of 1838 was also repealed by the schedule to the Constitution, which declared that all provisions of all laws inconsistent with the Constitution shall cease, either upon its adoption, or six years after its adoption; and the existence of that board of commissioners of 1838, consisting of two aldermen, three councilmen and two magistrates, was entirely inconsistent with the Constitution, which requires each county to have a fiscal court, composed of an entirely different body of men.
4. The Kentucky Statutes (sec. 927) provided for the fiscal court buying lands, building courthouses, jails, etc. Section 1840 provided for the fiscal court furnishing courthouses, etc., managing the fiscal affairs of the county, and the levying of taxes, and other provisions gave to the fiscal court all the powers formerly given to the county and levy courts and board of commissioners of different counties; and, therefore, the fiscal court necessarily superseded those earlier bodies.
5. A board of commissioners, composed of three councilmen, two aldermen and two magistrates, is directly in the teeth of the Constitution (sec. 144), which entrusts the fiscal affairs of the

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Joyes v. Jefferson County Fiscal Court, &c.

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- county to a fiscal court, to be composed of the county judge and all the magistrates, or of the county judge and three elected commissioners. The provision in the Constitution for such a court to attend to the fiscal affairs, excludes the Legislature from entrusting any other body with those duties. *Perkins v. Auditor*, 79 Ky., 306; *Com. v. Williams*, 79 Ky., 42; *Lowe v. Com.*, 3 Met., 241.
6. The board of county commissioners, under the act of 1888, violates the Constitution, because it requires city officials to also be county officials, which is incompatible. A city officer can not be a county officer under the new Constitution and laws. *Con.*, sec. 165; *Ky. Stats.*, secs. 3746, 2768.
  7. The city attorney's contention, that a fiscal court shall consist of the county judge and half the magistrates (those outside of the city), is directly in the teeth of the Constitution, which does not authorize any such formation of the fiscal court. (*Con.*, sec. 144.)
  8. The provision of the Constitution authorizing three commissioners to be elected outside of the city, where the city and county are divided into two county governments, is not applicable to Jefferson county, because that county has never voted to adopt the "three commissioners" system, and also because the Kentucky Statutes have not created two county governments, two county courthouses, two county jails, etc., in this court. *Constitutional Debates*, vol. 4, p. 5749; *Ky. Stats.*, sec. 1847.
  9. The lawful form of the fiscal court for Jefferson county, at the present time, consists of the county judge, and all of the eight magistrates, including those in the city and those in the county. The appellants are, therefore, the lawful fiscal court of the county.

**EDWARD J. McDERMOTT ON THE SAME SIDE.**

1. The act of 1888 is repealed.
  2. Under section 144 of the Constitution there must be a fiscal court in every county, and whether it is composed of all the magistrates and the county judge, or of three commissioners, it must still be known as the fiscal court, and these commissioners must be elected by the people.
- Citations: *Ky. Con.*, secs. 144, 165; *Schedule*, sec. 1, *Ky. Stats.*, secs. 1833, 1840; *Broaddus v. Broaddus*, 10 Bush, 299; *Beard v. City of Hopkinsville*, 95 Ky., 239; *O'Mahoney v. Bullock*, 97 Ky., 774; *McTigue v. Com.*, 99 Ky., 66; *Pearce v. Mason County*, 99 Ky., 365; *Long v. Stone*, 19 Ky. Law Rep., 246; *Long v. Com.*, 18 Ky. Law Rep., 176; *Ky. Stats.*, secs. 2768, 2779, 3746, 1839, 927; *City of Louisville v. Wilson*, 99 Ky., 604; *Constitutional*

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Joyes v. Jefferson County Fiscal Court, &c.

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Debates, pp. 5748, 5749, 5949; Williams v. Com., 79 Ky., 42; Hoffman v. Trustees, 18 Ky. Law Rep., 302; Wolfe v. McHargue, 88 Ky., 261.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Jefferson Circuit Court, Chancery division, adjudging that the county judge and all the justices of the peace in Jefferson county constitute the fiscal court of said county. The opinion of the trial judge contains such a clear statement of the matters involved and the reasons for the conclusions reached that we copy from said opinion as follows:

"The question to be determined, therefore, is, what persons constitute the fiscal court of, Jefferson county? In tracing the history of the legislation concerning the county in this respect, it is unnecessary to go back of the act of April 6, 1888, as amended by the act of April 9, 1890. By the act as amended there was erected a Board of County Commissioners for Jefferson county, which consisted of the two justices of the peace elected as such commissioners by their associates in Jefferson county outside of the city of Louisville, of two aldermen of the city of Louisville elected as such commissioners by the Board of Aldermen of the city of Louisville, and of three councilmen of the city of Louisville elected as such commissioners by the Board of Council of said city, presided over by the county judge. This board, consisting of seven members besides the county judge, transacted the fiscal affairs of the county up to within a short time ago. It is now claimed by the plaintiff that this Board of Commissioners is still in existence. The defendants claim that the act of 1888 is repealed, and that the fiscal affairs of the county are now in the hands of the fiscal court, consisting of the judge of the county court and the justices of the peace of the county, as provided by section 144 of the Constitution.

"The city of Louisville has also filed its answer in this case, in which it has joined in the prayer of the petition. It is hardly necessary to go into the different claims of the parties in detail, as I deem it sufficient to treat the question as a single question, without stating more particularly the claims of the different parties.

"Section 144 of the Constitution provides as follows:

"'Counties shall have a fiscal court, which may consist of the judge of the county court and the justices of the peace, in which court the judge of the county court shall preside, if present; or a county may have three commissioners, to be elected from the county at large, who, together with the judge of the county court, shall constitute the fiscal court. A majority of the members of said court shall constitute a court for the transaction of business. But where, for county governmental purposes, a city is by law separated from the remainder of the county, such commissioners may be elected from the part of the county outside of such city.'

"The county of Jefferson has never adopted the alternative plan of commissioners provided by section 144. The fiscal court, as contemplated by the Constitution, consists of a body of men elected in the first place by the people, but who are not selected as commissioners by the people. If the act of 1888 is in force, the question is at once settled. If, however, it is not in force, there are other questions to be determined.

"I do not see how it can be reasonably contended, however, that the act of 1888 is now in force. In the first place, I deem it inconsistent with section 144 of the Constitution, which is paramount upon all subjects therein treated. That section expressly says that the county shall have a fiscal court, and goes further by saying what per-

sons shall constitute that court. It will be noticed that the Constitution takes up the questions of courts in detail. Beginning with section 109, we have the general heading relating to the judicial department; section 110 takes up the subject of the Court of Appeals; section 125, that of the Circuit Courts; section 139, that of Quarterly Courts; section 140, that of County Courts; section 142, that of Justices' Courts; section 143, that of Police Courts; section 144 treats of Fiscal Courts. By the act of October 17, 1892 (Kentucky Statutes, section 1833), the Legislature passed a comprehensive act relating to fiscal courts. That section expressly provides that each county in the Commonwealth shall have a fiscal court, which shall consist of the judge of the county court and the justices of the peace of said county and their successors in office, in which court the judge of the county shall preside, if present. That act contains this provision:

"That where the fiscal court of any county is composed of commissioners under a special act, said special act shall continue in force until the first Monday in January, one thousand eight hundred and ninety-five, after which the fiscal court of said county or counties shall be constituted and composed of the judge of the county court and the justices of the peace and their successors in office."

"It is a well-settled rule of construction in Kentucky that, where there has been a revision of a statute law upon a given subject, it will be regarded as containing all the statute law upon that subject, and as repealing any of the statutory provisions on the subject omitted from the new revision. *Broadbuss v. Broadbuss' Heirs*, 10 Bush, 109; *Long Treasurer, v. Stone, Auditor*, 19 Ky. Law Rep., 246 [39 S. W., 836].

"Now the Legislature has here taken up the regulation of the county fiscal management, and has enacted a com-

plete chapter on the subject, which is now the chapter on fiscal courts in the Kentucky Statutes; and under the principles laid down in the foregoing authorities I do not see how the conclusion can be avoided that this new statute must be construed and intended to supersede the previous statutes in regard to the fiscal management of county affairs. This belief is strengthened when we consider section 144 of the Constitution in connection with the act of 1892, and the concluding provision of said act, which limits the existence of the old fiscal courts of the county then existing under special acts. Furthermore, under section 1 of the schedule of the present Constitution it is expressly provided that the provisions of all laws which are inconsistent with this Constitution shall cease upon its adoption, except that such laws as are inconsistent with the provisions of the Constitution as require legislation to enforce them shall remain in force until such legislation is had, but in no event for a longer period than six years after the adoption of the Constitution, unless sooner amended or repealed in General Assembly.

"The Constitution was adopted September 28, 1891. The limitation, therefore, expires September 28, 1897. So that the conclusion seems inevitable that in any event the Board of County Commissioners, as it existed under the act of 1888, stands repealed, because it is inconsistent with the constitutional idea of a fiscal court, and the Legislature has passed the act of 1892, reiterating that idea, and carrying out the provisions of the schedule above referred to.

"Referring again to the act of 1892 (section 1834 of the Kentucky Statutes), it is expressly provided that, 'unless otherwise provided by law, the corporate powers of the several counties in this State shall be exercised by the



fiscal courts thereof respectively.' Now, it has been contended that the Board of Commissioners, under the act of 1888, is a fiscal court, within the meaning of the act of 1892; but that contention does not seem sound to me, for the reason that section 1833, the opening section of the act of 1892, practically defines the fiscal court as being a body consisting of the judge of the county court and the justices of the peace of the county. Section 927 of the Kentucky Statutes expressly provides that the fiscal courts of the several counties are empowered to buy land, when the same is necessary, for the purpose of erecting thereon public buildings, such as court houses, clerks' offices, jails, and work houses. Here is a special authorization of the purchase of property to build a court house, and to do the very things which, before the new Constitution, would have to be done by the Board of County Commissioners under the act of 1888.

"Section 1840 provides that 'this fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair public buildings; to secure a sufficient jail, and a convenient and comfortable place for holding court at a county seat; to erect and keep in repair bridges and other public structures; to regulate and control the fiscal affairs of the property of the county; to make provisions for maintenance of the poor; to provide a poor house and farm; to execute all of its orders consistent with law and within its jurisdiction, and to have jurisdiction of all such matters relating to the levying of taxes as is, by a special act, now conferred on the county court and courts of levy and claims.' It certainly was the intention of the Legislature, in making these broad provisions, to make a change in the condition of affairs that existed under the act of 1888. The only

question really to be considered is, what persons constitute this fiscal court contemplated by the statute? I have no doubt that the Constitution and the act of 1892 both contemplated, certainly after September 28, 1897, a change in the management of the county fiscal affairs. *Louisville & N. R. R. Co. v. Pendleton Co.*, 96 Ky., 491 [29 S. W., 324].

"Substantially all of the powers that were vested in the Board of Commissioners under the act of 1888 are now vested in the statutory fiscal court, and that is necessarily implied, if implication, however, is necessary, as the provision in section 1833 of the Kentucky Statutes expressly limits the life of all such special bodies to the first Monday in January, 1895.

"It is contended, however, on behalf of the city, that under section 144 of the Constitution, and other sections of the Kentucky Statutes, if there is a fiscal court, it is to consist of the county judge and the four justices of the peace who live in Jefferson county outside of the city of Louisville. This argument is based upon the final clause of said section 144, which provides as follows: 'Where, for county governmental purposes, a city is by law separated from the remainder of the county, such commissioners may be elected from the part of the county outside of said city.' Section 1851, Kentucky Statutes, provides as follows: 'Where, for county governmental purposes, a city is by law separated from the remainder of the county, that portion of the county outside of the limits of said city shall be deemed the county, within the meaning of this act.' It is argued on behalf of the city that, under this section of the Constitution and the Kentucky Statutes, we would have a fiscal court composed of the county judge and the four justices of the peace located in the county, who would be authorized to levy tax upon the property within

the city of Louisville, and that the city would thus be subjected to a tax which it had not the power to control or levy, and that it would not be represented in such levy. The difficulty in this contention, however, is that it implies the power of the Legislature to change by construction the possible meaning of the Constitution. The Constitution nowhere limits the meaning of the term 'county' as the statute attempts to limit it. Under the contention of the city, there is no common board, composed of a representative of the city and county, which can levy a tax for the common benefit of the city and county. The trouble seems to arise from the last clause of section 144 of the Constitution, above quoted. As originally reported, section 144, *supra*, did not contain the last clause above quoted. The history of the insertion of that clause is found on page 5748 of the Constitutional Debates. When the section was read as altered, the question was raised as to what it meant. Whereupon Senator Goebel, of Kenton county, said: "That was presented by me in the committee, and was adopted for this reason: In the county of Kenton, the city of Covington is wholly separated by law from the remainder of the county with reference to the county government. We have two county seats, and the part of the county outside of the city is as separate from the city as if we were two counties. The city of Covington pays for maintaining its court house and jail, and the part of the county outside of Covington is conducted by three commissioners, elected on the part of the county outside of Covington. If the section is adopted as originally presented, the city of Covington would vote in the election for the county commissioners to control the affairs of the county outside of Covington, in which the city has no interest whatever, and to which it pays not one cent." Mr.

Miller, of Lincoln county, thereupon took exceptions to the proposed change, and its possible effect, in the following language: "They may be willing to tolerate it in Covington, but I am not willing to tolerate it. There may be reasons for it in Kenton, but there is no reason for it in the balance of the State. If the amendment prevails, there is a recognition of the principle and power to separate counties into divisions for the purpose of managing the fiscal affairs of the county. In other words, instead of having the whole fiscal affairs of the county managed under one head, you may separate them, and have that portion of the county which lies in the limits of the city managed in a way different from the outlying districts. That is a material change in the Constitution, and I do not see any reason why every portion of the fiscal affairs of the county should not come under the same management. . . . I do not want it to even be permissive. I do not want the Legislature authorized to do this—if this amendment is adopted, I hope it will be made applicable to Kenton county alone." Whereupon Mr. Goebel answered: "If you have not a separation of your county now, it will not apply to your county." Thereupon the controversy ended, and, although Mr. Miller had aptly stated what he conceived to be the effect of the amendment, which is substantially the argument made in this case, still the convention seems to have adopted Mr. Goebel's explanation as the true meaning of the section as amended, and that it would not apply to any county except Kenton, or a county organized as Kenton county was organized."

It is earnestly insisted for appellants that section 2744, Kentucky Statutes, which reads as follows: "For county governmental purposes a city of the first class is hereby separated from the remainder of the county in which such

city is situated. The general council shall provide by ordinance suitable appropriations for the purpose of paying such city's portion of all expenses common to both such city and county," separated the city of Louisville from the balance of Jefferson county, for governmental purposes, and devolved upon the city council the power and duty to provide for paying the city's portion of all expenses common to both city and county; and it is also insisted that such separation is authorized by the latter clause of section 144 of the Constitution, quoted in the opinion, *supra*. We do not think that said section can have the effect contended for, even if such separation was authorized by the latter clause of section 144, *supra*.

We have read with care the very able briefs discussing the true meaning of section 144, and we are of opinion that the latter clause of said section was intended by the framers of the Constitution to apply to such counties only as has two county seats, and in which the city was in reality separated from the balance of the county for county governmental purposes. If at the time any county had in fact two county seats, and the city was separated from the balance of the county, as indicated in said section, the clause under consideration would apply to such counties. We, however, deem it unnecessary to now determine whether or not there was in reality any county in the condition described in the latter clause of the section, *supra*. But, be that as it may, we are clearly of the opinion that the city of Louisville was not so separated from the residue of Jefferson county. We are further of the opinion that the section relied on does not authorize the Legislature to so separate any city from the residue of the county. The mere fact that at the time of the adoption of the Constitution there was a statute providing for

Cooper v. Wait, Treasurer.

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the levy and collection of a portion of the county taxes by city authority, and another portion by the county authorities outside of the city, did not constitute a separation of the city, from the county for county governmental purposes. It results from the foregoing, that we are of the opinion that the fiscal court of Jefferson county is composed of the county judge and the eight justices of the peace of Jefferson county.

The judgment appealed from is therefore affirmed.  
The whole court sitting.

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CASE 77—MANDAMUS TO PAY COUNTY WARRANT—MAY 19.

Cooper v. Wait, Treasurer.

APPEAL FROM PULASKI CIRCUIT COURT.

1. **STATUTES—REPEAL OF—SPECIAL ACT RELATING TO CLAIMS AGAINST PULASKI COUNTY.**—The act of April 22, 1890, requiring the county treasurer of Pulaski county to pay county warrants in the numerical order in which they were presented was repealed by the act embodied in the Kentucky Statutes relating to the administration of county finances.
2. **COUNTY CLAIMS—ORDER OF PAYMENT.**—It is the duty of the county treasurer to pay in the order of their presentation warrants issued for county claims for the current year out of the funds in his hands arising from the levy of such year in preference to warrants issued for claims arising in former years.

O. H. WADDLE FOR THE APPELLANT.

1. The special act of April 22, 1890, requiring county treasurer of Pulaski county to pay warrants in their numerical order was not repealed either by the adoption of the new Constitution or by the adoption of the act regulating the administration of county finances.
2. Even if the act of April 22, 1890, has been repealed, it was nevertheless the duty of the treasurer to pay appellant's warrant out

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Cooper v. Walt, Treasurer.

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of the funds in his hands at the time the application for a mandamus was made.

Citations: Ky. Con., sec. 60, and sec. 1 of the schedule; Ky. Stats., secs. 931, 1882; Black on Interpretation of Laws, vol. —; 23 Am. & Eng. Ency. of Law, 489; Saul v. His Creditors, 16 Am. Dec., 212; Bruce v. Schuyler, 46 Am. Dec., 448; Carver v. Smith, 46 Am. Reps., 210; Brown v. Miller, 4 J. J. Mar., 474; Com. v. Mason, 82 Ky., 256.

G. W. SHADOAN FOR THE APPELLEE.

The funds in the hands of the treasurer came solely from the levy and collection of taxes for county purposes for the year 1898. The levy was laid for the purpose of paying the claims laid by the fiscal court for that year and until all of such claims have been paid he can not apply these funds to any other purpose. Ky. Stats., secs. 1882, 931; Ky. Con., sec. 157. The special acts of 1885, 1886, and 1890 have been repealed. Ky. Stats., art. 1, ch. 34.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

It appears from this record that appellant was the county school superintendent for Pulaski county, and that at the April term, 1897, of the fiscal court of Pulaski county the following order was entered:

"It is ordered by the court that J. S. Cooper be, and he hereby is, allowed the sum of one thousand fifty-two and xx-100 dollars, payable out of the county treasury for salary for 1896.

"\$1,052.

N. L. Barnett, Clerk F. C. P. C."

It is agreed that said order was presented to J. A. McGee, Treasurer, April 30, 1897, and numbered 994, and payment refused for the reason that the treasurer had no funds; but he indorsed the same as follows: "No. 994. April 30, '97. J. A. McGee, Treas." It is further agreed that the appellee is the successor of said McGee in the office of treasurer, and that both of them kept a memorandum of the claims presented to them in the order of their presentment, and indorsed on the back of the warrants

presented for payment that were not paid for the want of funds the number showing the numerical order in which the claims were presented and payment demanded; and the number 994 on the claim in controversy shows the numerical order in which said warrant was presented for payment, according to the memorandum kept by the then treasurer, McGee. It is further agreed that, since the appellee entered into office, he has received, and had at the time of the institution of this suit in his hands, from the general revenues of the county, the sum of \$8,879.90, which should be used and paid out by him on the claims allowed by the fiscal court, certified by the clerk, including the character of claim of plaintiff herein referred to. It is further agreed that the funds in the hands of appellee, as treasurer, were paid to him by the sheriff of the county from collection of the county levy made for the year 1898, and that there are no funds in the hands from collections for either the year 1896 or 1897; and that there are no available means out of which to pay plaintiff's claim, except the funds now in defendant's hands. And it is further agreed that, if appellant is entitled to have his claim paid out of the revenues of the county collected and paid into the treasury in the numerical order in which it was allowed by the court or presented to and demanded of the treasurer, he is entitled to have the same paid by the defendant out of the aforesaid funds in his hands; the said funds now being available for the payment of the same, and the said claim being entitled to be paid therefrom, numerically considered. It is also agreed that the appellant had demanded of the appellee payment of the said claim, with interest from the 30th of April, 1897, until paid, and, that being refused, demanded payment of the principal, which was also refused. It is further



agreed that there are outstanding claims against the county, allowed for expenditures for the year 1898, amounting to more than the above amount of money in appellee's hands, and that the holders of the claims for the year 1898 are claiming that they are entitled to have their claims paid by appellee in preference to the claim of appellant.

The appellant sought in this action, upon the agreed facts, to obtain a mandamus from the circuit court of Pulaski county, ordering and directing the treasurer to pay his claim. Upon final hearing, the court adjudged that the plaintiff is not entitled to the specific relief prayed for in the petition, and adjudged that the cause be, and the same is hereby, dismissed; and it was further adjudged that the defendant, George W. Wait, treasurer, pay the claims allowed for each fiscal year out of the revenues levied and collected and paid to him for such year; and the court construes the order of the fiscal court for a levy of the taxes for 1898 as a levy made to pay the current expenses for said year; and it was further adjudged that the claims allowed and certified each year should be paid out of the revenue for such year in the numerical order in which the same are presented to him and payment demanded; and it is further adjudged that the act of April 22, 1890, is repealed, and no interest is payable upon certificates of county indebtedness. To all of which judgment appellant excepted, and prayed an appeal to this court, which was granted.

It is the contention of appellant that the acts of April, 1885, 1886, and 1890, required the treasurer to pay the claim heretofore referred to.

It is the contention of appellee that said acts were repealed by the Kentucky Statutes, and in this contention

we concur. Chapter 52, Kentucky Statutes, contains the general law regulating the collection, levy, and disbursement of county funds, and, under the well-settled rules of construction, operated to repeal the special acts heretofore referred to. It will be seen that the claim in controversy was payable out of the revenue of the county to be collected prior to 1898, and that the revenues collected for the year 1898 were levied for purposes exclusive of appellant's claim; and it seems to us that, under the provisions of section 180 of the Constitution of the State, the revenue levied and collected for current expenses for the year 1898 could not be legally applied to the payment of appellant's claim. If the revenues intended to be applied to the payment of appellant's claim should not be available for that purpose, it would be the duty of the fiscal court to make other provisions for the payment thereof.

We do not deem it necessary to determine the question as to whether or not appellant will be entitled to recover interest upon his claim after the time it was legally due and payable. In our opinion, he could not demand from the treasurer interest, because there is no law requiring the treasurer to pay interest. Whether it be the legal duty of the fiscal court to provide for the payment of interest is a question not before us, and therefore not decided.

Judgment denying the mandamus prayed for is affirmed.

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Louisville & Nashville Railroad Company v. Commonwealth.

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CASE 78—INDICTMENT FOR VIOLATING LONG AND SHORT  
HAUL STATUTE—MAY 20.

108 633  
114 797  
114 808

Louisville & Nashville Railroad Company v.  
Commonwealth.

APPEAL FROM MARION CIRCUIT COURT.

CONSTITUTIONAL LAW—LONG AND SHORT HAUL—COMPETITION AT  
TERMINUS OF LONG HAUL.—Competition at the terminus of the  
long haul does not prevent the carriage from being "under sub-  
stantially similar circumstances and conditions" within the  
meaning of that language in section 218 of the Constitution.  
(The principles of the case *L. & N. R. R. Co. v. Com.*, reported  
in 104, Ky., 226, reaffirmed.)

WILLIAM LINDSAY AND WALKER D. HINES FOR THE APPELLANT.  
(H. W. BRUCE AND E. W. HINES OF COUNSEL.)

1. Cost of transportation can not be ascertained or serve as the basis for making rates; they are necessarily controlled and determined by commercial conditions. *In re L. & N. R. R. Co.*, 1 I. C. C. Rep., 63; *Foot v. Railroad Co.*, N. Y. Ry. Com. Rep., 1884, vol. 1, p. 104; s. c. 21 Am. & Eng. R. R. Cases, 63; *Int. Com. Com. v. B. & O. R. Co.*, 43 Fed. Rep., 37; *C., N. O. & T. P. Ry. v. Int. Com. Com.*, 162 U. S., 184; *T. & P. Ry. v. Int. Com. Com.*, 162 U. S., 197.
2. The Kentucky long and short haul law, as formerly construed by a majority of this court, amounts to an arbitrary and sweeping prohibition of legitimate traffic.
3. The competitive traffic involved in this case is perfectly legitimate, and any arbitrary interference with the right of the railroad company to engage in it can not be valid as an exercise of the police power. *Tiedeman's Lim. of Police Power*, pp. 45, 184, 194, 196, 197, 198 and 593; *Black's Con. Law*, p. 73; *Mugler v. Kansas*, 123 U. S., 623; *Lawton v. Steele*, 152 U. S., 133; *Burnside v. Lincoln County Court*, 86 Ky., 423; *Plessy v. Ferguson*, 163 U. S., 537; *Ohio Valley Ry.'s Receiver v. Lander*, 20 Ky. Law Rep., 913.
4. Such an arbitrary interference with the railroad company's right to engage in a legitimate traffic deprives it of its property without due process of law, and denies it the equal protection of

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Louisville & Nashville Railroad Company v. Commonwealth.

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the law. *In re Jacob's* 98 N. Y., 98; *C. M. & St. P. Ry. Co. v. Minnesota*, 134 U. S., 418; *Ex parte Koehler*, 23 Fed. Rep., 529.

5. And likewise impairs the obligation of the appellant's charter contract. *Cooley's Con. Lim.* (5th ed.), p. 712.
6. And likewise interferes unlawfully with interstate commerce.
7. The proper construction of the long and short haul law discussed.

(a) Construed according to the reasonable and natural meaning of the words used, and giving effect to every part of the section, it can not prohibit charging more for a short than for a long haul, where the less charge for the long haul is necessitated by controlling and unavoidable competition.

(b) This construction is demanded by the fact that it was the settled construction of the same language in the Interstate Commerce Act at the time that identical language was adopted as the law of Kentucky.

*In re L. & N. R. R. Co.*, 1 I. C. C. Rep., 31; *Mo. Pac. Ry. Co. v. T. & P. Ry. Co.*, 31 Fed. Rep., 862; *Ex parte Koehler*, 31 Fed. Rep., 315; *Com. v. Bush*, 2 Duv., 264; *Int. Com. Com. v. Ala. Midland Ry. Co.*, 168 U. S., 144.

(c) This construction is required by the obvious purposes of the law, and is the only construction which would accomplish all of those purposes.

(d) This construction is also required on account of the injurious consequences which would result from any other construction.

*Yick Wo v. Hopkins*, 118 U. S., 356; *City of Baltimore v. Radecke*, 49 Md., 217.

8. The construction thus contended for will give the law its full effect, and will wholly prevent the unjust discriminations it was intended to reach.
9. The construction contended for has been repeatedly adopted by the Federal Courts, including the Supreme Court, and the contrary construction has no authority to support it. *M. P. Ry. Co. v. T. & P. Ry. Co.*, 31 Fed. Rep., 820; *Ex parte Koehler*, 31 Fed. Rep., 315; *Int. Com. Com. v. A. T. & S. F. R. Co.*, 50 Fed. Rep., 295; *Int. Com. Com. v. Ala. Midland Ry. Co.*, 69 Fed. Rep., 227; *s. c.* *In Circuit Court of Appeals*, 71 Fed. Rep., 715; *Int. Com. Com. v. L. & N. R. R. Co.*, 73 Fed. Rep., 409; *T. & P. Ry. Co. v. Int. Com. Com.*, 162 U. S., 197; *Int. Com. Com. v. Ala. Mid. Ry. Co.*, 168 U. S., 144; *Brewer v. Cent. of Ga. Ry. Co.*, 84 Fed. Rep., 258; *Int. Com. Com. v. W. & A. R. Co.*, 88 Fed. Rep., 186; *Int. Com. Com. v. W. & A. R. Co.*, decided by U. S. Circuit Court of Appeals for 5th District at its November term, 1898, but not yet reported.

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Louisville & Nashville Railroad Company v. Commonwealth.

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W. S. TAYLOR, ATTORNEY-GENERAL, H. W. RIVES AND M.  
H. THATCHER FOR THE APPELLEE.

(Briefs not in the record.)

(From the judgment in this case, a writ of error was prosecuted to the Supreme Court of the United States and at the October term of 1901 the judgment herein was affirmed.)

JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Section 218 of the Constitution is as follows: "It shall be unlawful for any person or corporation owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person, or corporation owning or operating a railroad in this State to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the railroad commission such common carrier, or person or corporation owning or operating a railroad in this State, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State may be relieved from the operation of this section."

To carry the above into effect, the General Assembly enacted the following statute:

"If any person owning or operating a railroad in this State, or any common carrier, shall charge or receive any

Louisville & Nashville Railroad Company v. Commonwealth.

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quoted. It is earnestly argued for appellant that the transportation is not under substantially similar circumstances and conditions when competition exists at one point and not at another and we are referred to numerous decisions of the Federal courts so holding.

On the other hand, it is contended for the State that to adopt this construction is to emasculate the section, and deprive it of all practical operation and effect.

The precise question thus presented was determined by this court in the case of L. & N. R. R. Co. v. Com., 104 Ky., 226 [46 S. W., 707; 47 S. W., 210, 598], where the construction of the section adopted by appellee was sustained. We are urged to overrule that case; but it was fully considered, and then reconsidered by the whole court, and we are disinclined, with substantially no new light upon the question, to set aside the conclusion of the court reached then after so mature deliberation.

It is insisted for appellant that this construction of the section makes it an arbitrary interference with the right of appellant to engage in competitive traffic, depriving it of its property without due process of law, denying it the equal protection of the law, impairing the obligation of its charter contract, and unlawfully interfering with interstate commerce. All of these objections may be considered together.

A railroad is only an improved modern highway. It must, of necessity, be subject to public control, like its predecessor, the turnpike; for the industry and commerce of the country are dependent upon it. To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the

community, and utterly out of keeping with the doctrine that they are public agencies, and so have the right to appropriate to their use the property of the citizen against his consent upon making him just compensation. It has been notorious that railroad managers have, by discrimination in favor of certain shippers or a given locality, brought ruin to others. It was the aim of the Constitution to require the railroads in the State to treat all localities fairly and with equality; but, as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul under like circumstances and conditions, with full power in special cases "from time to time [to] prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State may be relieved from the operations of this section." It is not confined in its power to each shipment as it may be made, but may prescribe, from time to time, a suspension of the section on freight of a given character between given points, as the public interest and the ends of justice may require.

We are unable to see that as yet any right of appellant has been invaded, or that it has any just cause of complaint. If it be true that the public interests require the discrimination in rates shown in this case, and that no injustice has really been done, it may be that upon presentation of the facts to the Railroad Commission it would allow the rates to stand, and make an order exonerating appellant from the operation of the section.

It does not appear that appellant has presented its case to the Railroad Commission, and we infer that it has not

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Louisville & Nashville Railroad Company v. Commonwealth.

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done so from the fact that this case seems to have been specially prepared to present these questions here, and there is no reference to a similar effort before the Railroad Commission. Although the Commission refused to exonerate appellant on the evidence it had before it, it does not follow that it would still refuse to do so if proper evidence was offered. It represents the whole State, including the railroad and its stockholders as well as other people, and has always shown a laudable zeal for the interest of the entire State. The power to determine this matter must be vested somewhere, and, the Constitution having created a special tribunal for this purpose, we can not see that its provisions are subject to any of the objections raised by appellant.

If the railroad companies are not to be allowed to have exclusive control over the rates for the long and short haul, and the sole right to determine when competition exists, and to what extent, special rates, for this reason, may be given, we do not see any more just arrangement that can be made than the selection of an impartial tribunal to hear and determine the matter. Since Adam's first-born dyed his hands in his brother's blood, self-interests have warped and controlled human judgment. However honest and faithful railroad managers may be, they necessarily look first to the interests of those they serve; and no principle of constitutional law is violated when the State, which has created these agencies for the public service, creates an impartial tribunal to prevent their great powers from being used to build up certain favored ones at the expense of others.

Counsel for appellant in effect concede in their brief that the State may prevent unjust discrimination, and that if appellant's rates are judicially determined not to be reasonable, it may then be punished.



Their argument, in effect, is that appellant may be punished under the section of the Constitution, although its rates are reasonable, and the discrimination is made necessary by competition in trade over which it has no control. This assumes that the Railroad Commission will allow the interests of the State to suffer from an unjust rule, or that it will do injustice to appellee. We can not see that a jury is better qualified to pass on the reasonableness of a rate than a skilled commission, nor is it by any means sure that a trial by jury would be in practice any more satisfactory to appellee. It is true, the Commission may make mistakes; but we see no reason for the apprehension that an impartial tribunal will err more to the prejudice of one of the parties to a controversy than that party might himself to the prejudice of the other, if the solution of the question were left to him alone. It may be the Commission, on the complaint referred to, from the evidence before it, concluded that the rate to Louisville was as large as it should be to afford a fair compensation for the haul to Lebanon, or that the competition with another railroad in the State did not justify the discrimination in favor of Elizabethtown. If it erred in any of its conclusions, it has power, from time to time, on further evidence, and a fuller hearing, to make such orders as the ends of justice may require; and, if the State may control the matter at all, we can not see that the plan proposed is unfair, or in excess of the rightful police power of the State.

It is urged that this construction of the Constitution will allow coal and other freights from without the State to be shipped cheaper than they can be hauled to the same point if shipped within the State, as under the interstate commerce act, competition is held to exclude the carrier from the long and short haul clause. The Constitutional

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Louisville & Nashville Railroad Company v. Commonwealth.

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Convention no doubt had just such considerations in mind when it gave the Railroad Commission the plenary powers conferred on it as above explained. It is the duty, and no doubt will be the pleasure of the Railroad Commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole shall be promoted.

The Interstate Commerce Act, under the Construction that has been given it, has proved a sore disappointment to many of its friends. The subject is new. That act was an experiment. The provision of our Constitution is an experiment in another direction. The subject is one of great difficulty, and, if experience does not find our provision to bring just results, it may lead to that system which will do justice to all, and bring these intricate questions to a just and fair settlement. Judgment affirmed.

CHIEF JUSTICE HAZELRIGG AND JUDGES DURELLE AND BUR-  
NAM DISSENTING.

CHIEF JUSTICE HAZELRIGG'S DISSENTING OPINION.

It is not disputed that, at the time of the incorporation of the long and short haul clause of the act of Congress into the Kentucky Constitution of 1891, the settled construction of the clause by the tribunals charged with its enforcement, as well as the construction of the same clause by the federal courts theretofore called on to construe it, was the same as was subsequently adopted by the Supreme Court of the United States. When this court, therefore, came to construe the clause, it had before it the decision of the question at issue by the Supreme Court of the United States and the decisions of numerous federal courts, all agreeing that competition was a controlling factor in

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Louisville & Nashville Railroad Company v. Commonwealth.

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the adjustment and regulation of rates, and that its presence and influence conspired to make the "circumstances and conditions" of shipments substantially dissimilar from shipments where such competition did not exist. I insisted then, as I do now, that it ought to have been assumed as indisputable that, when the framers of our Constitution took the pains to copy the federal law on the subject involved, they expected the same construction to be put on the borrowed language as had theretofore been put on the law from which they borrowed. Indeed, the ordinary rules of construction required the adoption of the views of those courts which had already construed the law when we incorporated it into our law. This court has again and again announced the principle that, by borrowing the law from a given source, we borrow its construction as well. Instead of departing from this settled rule, there are controlling and peculiar reasons affecting the regulation of common carriers why the principle adverted to should be adhered to. The carriers to whom the law was to be applied were in the main interstate carriers, and were making their shipments into and out of the State under traffic rates adjusted to meet the construction of the long and short haul clause by the federal courts.

Our lawmakers must have foreseen that the same law should control all classes of shipments, else there was danger of gross discrimination against the interests of our own people. The question concretely put before them was, shall the mine owners of Jellico, Tenn., have access to the trade centers of the State of Kentucky at the cheap competition rate, while the output of mines at Jellico, Ky., a few hundred yards off, shall be limited to the local demand, and be shut out of the larger market, because of the higher and non-competitive rates? The answer was

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Louisville & Nashville Railroad Company v. Commonwealth.

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such as it ought to have been. The lawmakers agreed to adopt even the ambiguous and awkward phraseology of the federal (the interstate) law, to the end that, whatever might be the construction of the law, at least it must, according to well-settled rules, be the same construction, whether applied by the State or by the federal tribunals. I venture to say that it never entered the minds of our lawmakers that this law would receive a construction radically different from the construction put on it by the federal courts, certainly not if this different construction must result to the disadvantage of intrastate traffic.

It is not amiss to say here that a departure from this well-settled rule has already inflicted irreparable loss on the coal interests of the State in the locality where the question has arisen. And the construction will continue to embarrass and delay development of the great forests and mines of Eastern and Southeastern Kentucky. Aside from all this, there is a more serious question involved.

Under the law as construed by the majority opinion, the company must (1) increase its rates from the Kentucky mines to Louisville beyond the rates fixed to Lebanon, or (2) decrease the rates from the mines to Lebanon below those charged to Louisville, or (3) depend upon the arbitrary will of the railroad commissioners to adjust the rates as to them may seem proper. If the first alternative is forced on the company, the result is a prohibition of the carriage of coal from the mines to Louisville, as none could be sold there. This result would be confessedly an unwarrantable interference with the reasonable use of the company's property.

If the second, then the company is forced to furnish the use of its property at a price below that which is reasonable, and at rates below those which afford a fair

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Louisville & Nashville Railroad Company v. Commonwealth.

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and just return on the capital invested. This is true, because it is to be assumed that the rates from the mines to Lebanon are already reasonable and just. The proof offered is conclusive on this point.

The only remaining refuge of the company is to submit its management to the arbitrary will of the Commissioners.

And this, say this court, in effect, is better than to leave the matter at issue to a jury. I think the court overlooks the fact that a jury must act within the rules of law. A trial before a jury is had under the ordinary forms of law. The judge and jury are at least controlled and bound by legal principles and precedents.

I think, in the first place, neither Congress nor the constitutional convention ever intended to vest their respective boards of commissioners with such extraordinary powers, and, in the second place, I think the law so construed would result in an unwarrantable interference with the reasonable use of the appellants' property, and to an extent not permissible under either the State or Federal Constitution.

In the recent case of Lake Shore & Michigan S. Railway Co. v. Smith (April 17, 1899) [19 Sup. Ct., 565], the principle is emphasized that the power of the State, in the matter of regulating railroads, is to be exercised in subordination to the Federal Constitution, and that railway companies have a constitutional right to manage their own properties, subject only to the exercise by the State of a reasonable supervision. To say that as yet the company is not hurt, because the Commission will "do right," is but begging the question. Such a construction results in the substitution of a tribunal to try the property rights of the company which is restricted by no legal safeguards.

The statute so construed is clearly in conflict with the Constitution of the United States.

In *Chi., M. & St. P. Ry. Co. v. Minnesota*, 134 U. S., 418 [10 Sup. Ct., 462, 702], the Supreme Court said: "This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the State court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

Without elaboration, I respectfully dissent from the opinion of the majority, and refer to the former dissenting opinion in the same matter as indicating my view in detail of the real meaning and purpose of the statute.

JUDGES BURNAM AND DURELLE CONCUR.

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CASE 79—WILL CASE—MAY 20.

Sanders, Administrator, Etc. v. Babbitt, Etc.

APPEAL FROM BULLITT CIRCUIT COURT.

WILL—REVOCATION.—A will is revoked where the testator causes his name and those of the attesting witnesses to be cut from it with the intent to revoke it; and the retention of the mutilated

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Sanders' Admr., &c., v. Babbitt, &c.

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instrument with alterations in the testator's handwriting does not revive it.

**J. W. CROAN FOR THE APPELLANTS.**

The will of G. N. Sanders was not revoked because the intention to revoke was lacking. Ky. Stats., ch. Wills; Neville Beauchamp's Will, 4 Mon., 363; Williams on Executors, p. 66, and authorities cited; Kent's Com., vol. 4, 629 (Comstock's ed.). And the intention to revoke is a question of fact. 5 Bush, 337; Tudor v. Tudor, 17 B. M., 389.

**CHARLES CARROLL FOR THE APPELLEES.**

1. The will of Sanders was revoked and was never revived. Ky. Stats., sec. 4833; 5 Bush, 337; Tinker v. Ringo's Exr., 11 Ky. Law Rep., 120-1.
2. It would be unfair to the appellees that the costs of the appeal should be paid out of the estate if the judgment should be affirmed.

**J. W. CROAN FOR THE APPELLANTS IN A PETITION FOR A REHEARING.**

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

This is an appeal from a judgment of the Bullitt Circuit Court refusing to probate a certain paper as the last will of G. N. Sanders.

The facts in reference to the execution of the paper are as follows: In December, 1892, decedent, G. N. Sanders, had one of his neighbors, Mr. Gilmore, write his will at his dictation, which Sanders subsequently signed in the presence of S. D. Brooks and Wilson Summers, who attested same at his instance and request; and this will was delivered by Sanders to Summers, to be kept until his (Sanders') death. Some two years later, Sanders took the will out of the possession of Summers, saying that he wished to make some change in it. Shortly afterwards he again sent for Gilmore, and notified him of his purpose to change the will; and, after some talk as to the best way to do it, Sanders directed Gilmore to cut his name

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Sanders' Admr., &c., v. Babbitt, &c.

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and that of the subscribing witnesses from the paper, leaving the will above it unchanged; and then Gilmore, in the presence of Sanders, and by his direction, made several additional bequests to certain of his children, and the paper was then delivered to Sanders, who said that he would have it attested. After the death of Sanders, which occurred within less than a year from this time, this will was found among his papers, signed in his proper handwriting, but not attested; and, in addition to the additions made to the will by Gilmore, the fourth clause had been changed by erasing so much of same as devised \$300 in cash to his daughter, Mrs. Roy, and deceased, in explaining the reason for this change, in his own handwriting interlined the will, adding these words: "The reason I cross out the above is that Theresa Roy has but one child, and he is a young man with a complete education, and Steve Sanders has three boys; and I gave Theresa Roy \$500 in cash, and nine acres of land, which she sold for \$300 cash, and for which I paid \$712 for the same land."

He never called upon his neighbors to attest the will after the addition had been put to it, and, upon the offer to probate it, the court rejected the will on the ground that the cutting off the name of testator and the subscribing witnesses therefrom by testator's direction, and in his presence, was a revocation thereof; and, the paper never having thereafter been re-executed as required by law, it was adjudged that it was not entitled to be probated as the last will of decedent.

We are asked, upon this appeal, to probate that part of the will which remained after the signatures of testator and the attesting witnesses were cut off, upon the ground that the cutting of these signatures from the will



by direction of testator was not done with the intent to revoke the will, and that the addition should only be treated as a codicil.

Section 4833 of the Kentucky Statutes provides that "No will, or codicil, or any part thereof, shall be revoked unless under the preceding section, or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence, and by his direction, cutting, tearing, obliterating, canceling or destroying the same, or the signature thereto, with the intent to revoke."

This provision of our statute is a substantial re-enactment of the English statute of frauds (St. 29 Car. II. c. 3, sec. 6), and of the wills act of Victoria (St. 1 Vict., c. 26, sec. 20); and in construing the latter in the case of *Clarke v. Scripps*, 2 Rob., 567, the court said: "It is to be observed that the 'burning, tearing or otherwise destroying' the instrument must be done with the intention to revoke. It is not the mere manual operation of tearing the instrument or the act of throwing it in the fire, or of destroying it by other means, which will satisfy the requisites of the law. The act must be accompanied with the intention of revoking. There must be the animus as well as the act. Both must concur in order to constitute a legal revocation."

And in *Giles v. Warren*, L. R. 2, Prob. & Div., 401, a testator, under the false impression that his will was invalid, tore it up. Immediately afterward, on reconsideration, he collected the pieces, and placed them together among his papers of importance, and preserved them until his death. It was held that, as the act done was not accompanied by an intention to revoke a valid will, it was

Sanders' Admr., &c., v. Babbitt, &c.

ineffectual; and the will was admitted to probate. Lord Penzance said: "The fact that a testator tears or destroys his will is not itself sufficient to revoke one properly executed; that is to say, the bare fact. If, for instance, he tears it, imagining it to be some other document, there would be no revocation, for there would be no intention of revocation. He must intend by the act to revoke something that he had previously done. There can be no intention to revoke a will, if a person destroys the paper under the idea, whether right or wrong, that it is not a valid will. Revocation is a term applicable to the case of a person canceling or destroying a document which he had before legally made. He does not revoke it if he does not treat it as being valid at the time when he sets about to destroy it. According to the evidence, the testator, in consequence of some conversation he had, was under the impression that he had made no valid will, and, as being useless, he tore the document up and threw it on the fire. That is no revocation."

In the case of *Doe v. Harris*, 6 Adol. & E., 209, it was said:

"There can be no doubt that, if the name of the testator had been burnt or torn out, the revocation would have been as complete as if the will had been torn in twenty pieces. If this were not the case, it would lead to many absurd consequences."

Sir H. Jenner, in *Hobbs v. Knight*, 1 Curt., 779, said:

"The question, then, comes to this: Whether this be or be not a destruction of the will, I consider the name of the testator to be essential to the existence of a will, and that, if that name be removed, the essential part of the will is removed, and the will destroyed."

In *Semmes v. Semmes*, 7 Har. & J., 388, it was held that:

"A will deliberately canceled without accident or mistake is revoked, though the testator afterwards intended to make a new will, but omits to do so."

In *Youse v. Forman*, 5 Bush, 337, it is said:

"If the testator cut or tore off the signature to this paper [his will], the law presumes it to have been done with the intent to revoke, but this intent may be fortified or rebutted by extrinsic evidence."

It is apparent that the controlling fact to be ascertained in passing upon the question of revocation is, what was the intention of deceased in having the signatures of himself and the attesting witnesses clipped from the paper? The signature is certainly an essential part of the will. Without it there can be no will; and, if it was the purpose of deceased to revoke his will, no more effectual means of doing so could have been resorted to, short of the total destruction of the paper. The evidence of such intention is fortified by the fact that, in addition to cutting off the signatures, he made a number of important and material changes in the disposition of his property, both by adding other clauses, and by erasing provisions previously inserted. It is certain that the paper sought to be probated is essentially different from that from which the signatures were clipped, and this is in itself persuasive of the intention of deceased to revoke the other; and that he thought the old will was revoked is conclusively shown by the fact that he informed the draftsman, after the additions had been made, that he would have the new document properly attested when the witnesses came out. After a careful consideration of all the facts and circumstances connected with the mutilation of the old will, we are of the opinion that it was done by deceased with the intention of revoking it, and, as the new will has never been re-

Aitken, Son & Co. v. Lang's Admr., &c.

vived by a re-execution thereof as provided by law, it was properly rejected as the last will and testament of decedent. For reasons indicated, the judgment is affirmed.

JUDGE PAYNTER DISSENTING.

WHOLE COURT SITTING EXCEPT JUDGE DURELLE.

CASE 80—ACTION ON GUARANTY—MAY 20.

Aitken, Son & Co. v. Lang's Administrator, Etc.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

GUARANTY—CONTINUING, TERMINATED BY DEATH OF GUARANTOR.—A continuing guaranty so far as it remains executory is terminated by the death of the guarantor, although the guarantee may be ignorant of such death.

GARVIN BELL FOR THE APPELLANT.

1. The guaranty sued on is a continuing guaranty.
2. The guaranty was not terminated by the death of the guarantor, S. C. Lang.

Citations: Brandt on Suretyship & Guaranty, pars. 92, 156 to 160; Lowe v. Beckwith, 14 B. M., 150; Glover v. Thompson, 78 Ky., 193; Steadman v. Guthrie, 4 Met., 156; Union Bank v. Costar's Exrs., 3 Com. Rep. (3 N. Y.), 204; White v. Baxter, 71 N. Y. R., 254; Bishop v. Eaton, 161 Mass., 437; Johnson v. Bailey, 79 Tex., 516; Wright v. Griffiths, 121 Ind., 478; Stern v. James, 4 N. Y. Sup., 816; Lehigh C. & I. Co. v. Scallan 63 N. W. R. (Minn.), 245; Davis v. Wells, 104 U. S., 159; Bradbury v. Morgan, 1 H. & C., 249; Hariss v. Pawcett, L. R., Ch. Ap., 866; Coulthart v. Clementson, 5 Q. B. Div., 46-7; Beckett v. Addyman, 9 Q. B. Div., 792; Westhead v. Sproson, 6 H. & N., 728; Offord v. Daviss, 12 C. B., 748; *In re* Sylvester, L. R. 1 Ch. for 1895, p. 573; Hyland v. Habich, 150 Mass., 112; Jordan v. Dobbins, 122 Mass., 168; Menard v. Scutter, 7 La. Ann., 385; s. c. 56 Am. Dec., 610; Knotts v. Butler, 10 Rich. Eq. (S. C.), 143; Gay v. Ward, 67 Conn., 167; Green v. Young, 8 Maine, 14; Jones v. Brown, 69 Cal., 37; Hightower v. Moore, 46 Ala., 387; Insur-

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Aitken, Son & Co. v. Lang's Admr., &c.

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ance Co. v. Davis 46 Ia., 469; Carter v. Hampton, 77 Va., 631; Kernochan v. Murray, 11 N. Y., 306; National Eagle Bank v. Hunt, 16 R. I., 153; Rapp v. Phoenix Ins. Co., 113 Ill., 396; Mechem on Agency, 245; Brandt on Suretyship, par. 1; Kilbridge v. Moss, 113 Cal., 432; Bell v. Bruen, 1 How., U. S. Ct., 182; Short v. Trabue, 4 Met., 302; Williams on Executors (5th ed.), par. 1559; Chitty on Contracts, par. 8, p. 101.

**KOHN, BAIRD & SPINDLE FOR THE APPELLEE**

The guaranty sued on, was of a severable character, subject to withdrawal on the part of the grantor at any time and terminated by the guarantor's death. It was, therefore, revoked by the death of the grantor without notice to the guarantee.

Citations: Jordan v. Dobbins, 122 Mass., 168; Hyland v. Habich, 150 Mass., 112; s. c. 22 N. E. R., 765; Harriss v. Fawcett, L. R., 15 Eq., 311; Bank v. Leavensworth, 26 Vt., 209; Bank v. Waterman, 30 Ill., 549; Slegel v. Forney, 15 Atl., 427; Parsons on Contracts (8th ed.), vol. 2, note to pp. 31-2; Pollock's Principles of Contracts, 21; Brandt on Suretyship & Guaranty (2d ed.), sec. 134.

**JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.**

To guaranty the appellants, Aitken, Son & Co., for goods which they might sell Miss Emma Lang, S. C. Lang executed and delivered to them a writing which reads as follows: "New York, March 15, 1895. Messrs. Aitken, Son & Co.—Dear Sirs: In consideration of the sale by you to Miss Emma Lang, doing business under the firm name of Mme. F. Lang, at Louisville, Ky., of certain goods now or hereafter to be bought by her, and for one dollar to me paid, the receipt whereof is hereby acknowledged, I hereby guaranty the payment by her to you of the price of such goods; and, if she does not pay the same when due, I agree to promptly pay said price on demand. [Signed] S. C. Lang."

On August 17, 1895, S. C. Lang died. For all the goods which the appellants sold Miss Lang previous to that date, she paid. The goods for which the appellants seek to hold the Lang estate liable were sold in September and Novem-

ber following his death. Assuming the averments of the appellants in the pleadings to be true, at the time the sales were made, in September and November, they were not aware of the death of S. C. Lang.

We understand counsel to agree that the writing which is the basis of this suit was continuing in its nature, unlimited as to time, and was to cover future sales made to Miss Lang. The question is, what effect upon the guaranty had the death of the guarantor, with reference to sales of goods after his death; the guarantees acting without notice? It is insisted by counsel for appellants that it is an executed contract, and therefore the death of the guarantor did not revoke it, whilst counsel for appellees contend it is an open, continuing offer—a unilateral, executory, severable contract—subject to withdrawal before acted upon, and that, therefore, the death of the party was a revocation of it. There is a conflict of authorities upon the question involved. Those which hold such a guaranty is not revoked by death reach the conclusion that the relations created by the guaranty between guarantor and guarantee is that of parties to an executed contract, whilst those who hold to the opposing view conclude the relationship to be that of a continuing offer for a contract. The guaranty declared upon is not limited as to time, nor does it limit the quantity of goods to be sold. It is continuing in its nature. The guarantees were not obligated by its terms to sell goods to Miss Lang upon the credit of the guarantor. It was a unilateral contract, which could be terminated at the pleasure of the guarantor. It is of a severable character, because, if the guarantees sold goods upon the faith of it, the guarantor was bound to pay for such goods as had been sold upon his credit, but the guarantees could no longer sell goods upon his credit if their

authority to do so had been revoked. A guaranty of the kind under consideration, in effect, is an offer by the guarantor to pay the guarantees for such goods as they might sell the purchaser named. It is somewhat in the nature of an offer by the guarantor to the guarantees for a contract, for no contract is consummated—no consideration passing—until the goods are sold. Therefore it can not be said it is an executed contract, with reference to the future. It is wanting in one of the essential elements of a contract—mutuality. No obligation is imposed on the guarantees.

The guaranty could only continue during the will of the guarantor, as he could revoke it. Its continuing quality being terminable at the will of the guarantor, is it not unreasonable to suppose that it was intended by the parties that when the power to terminate ceased, by death, it was to continue until notice of death was in some way given the guarantees? This notice might not be received for a long time, as the real and personal representatives of the deceased might be ignorant of the guaranty, and in the meantime the estate might be bankrupted. In our opinion, as the guaranty was terminable at the will of the guarantor, when that will no longer existed, by reason of death, it was thereby revoked. It would not be profitable to review the authorities upon the question here involved, as the case of *Jordan v. Dobbins*, 122 Mass., 168 [23 Am. R., 305], is a well-considered case, and sustains the conclusion we have reached. We quote from it as follows:

“An agreement to guaranty the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, is a contract of a peculiar character. Until it is acted upon, it imposes no obligation and creates no liability of the

guarantor. After it is acted upon, the sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise of the guarantor to pay for them.

The agreement which the guarantor makes with the person receiving the guaranty is not that I now become liable to you for anything, but that, if you sell goods to a third person, I will then become liable to pay for them if such third person does not. It is of the nature of an authority to sell goods upon the credit of the guarantor, rather than of a contract which can not be rescinded except by mutual consent. Thus, such a guaranty is revocable by the guarantor at any time before it is acted upon.

"In *Offord v. Davies*, 12 C. B. (N. S.), 748, the guaranty was of the due payment for the space of twelve months of bills to be discounted; and the court held that the guarantor might revoke it at any time within the twelve months, and that the plaintiff could not recover for bills discounted after such revocation. The ground of the decision was that the defendant's promise by itself created no obligation, but was in the nature of a proposal, which might be revoked at any time before it was acted on.

"Such being the nature of a guaranty, we are of the opinion that the death of the guarantor operates as a revocation of it, and that the person holding it can not recover against his executor or administrator for goods sold after the death. Death terminates the power of the deceased to act, and revokes any authority or license he may have given, if it has not been executed or acted upon. His estate is held upon any contract upon which a liability exists at the time of his death, although it may depend upon future contingencies. But it is not held for a liability which



is created after his death, by the exercise of a power or authority which he might at any time revoke.

"Applying these principles to the case at bar, it follows that the defendant is entitled to judgment. The guaranty is carefully drawn, but it is, in its nature, nothing more than a simple guaranty for a proposed sale of goods. The provision that it shall continue until written notice is given by the guarantor that it shall not apply to future purchases affects the mode in which the guarantor might exercise his right to revoke it, but it can not prevent its revocation by his death. The fact that the instrument is under seal can not change its nature or construction. No liability existed under it against the guarantor at the time of his death, but the goods for which the plaintiffs seek to recover were all sold afterwards.

"We are not impressed with the plaintiff's argument that it is inequitable to throw the loss upon them. It is no hardship to require traders, whose business it is to deal in goods, to exercise diligence so far as to ascertain whether a person upon whose credit they are selling is living.

"The decision in *Bradbury v. Morgan*, 1 Hurl. & C., 249, upon which the plaintiffs rely, was rested upon reasoning which appears to us to be unsatisfactory, and inconsistent with the opinion of the same court, a year before in *Westhead v. Sproson*, 6 Hurl. & N., 728, and with the decision in *Offord v. Davies*, *ubi supra*, at the argument of which *Bradbury v. Morgan* was cited; and it has not since been treated as settling the law of England. *Harriss v. Fawcett*, L. R., 15 Eq., 311, and L. R., 8 Ch. 866. The reasons of the similar decision in *Bank of South Carolina v. Knotts*, 10 Rich., 543, are open to the same objections."

2 Parsons on Contracts (8th Ed.), p. 31, in a note says:

"A continuing guaranty contemplates a series of transactions. As each takes place, a separate obligation arises as to that, and to that extent what was a revocable offer becomes an irrevocable contract. As to the future, however, death or notice may revoke it."

It is said in Pollock's Principles of Contracts, p. 21: "There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible, by removing one of the persons whose consent would make it."

It is said in 1 Brandt on Suretyship and Guaranty (2d Ed.), section 134: "It has been held that the death of a person who has given a letter of credit authorizing another to draw on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on his credit so as to bind his estate, though the person to whom, and for whose security the letter was given has no notice of his death, and the period for which the authority was given has not expired."

We believe it is but the recognition of a just and sound principle to hold that the death of the guarantor revokes a guaranty like the one under consideration. The duty should be imposed upon one who attempts to sell goods upon the credit of another to ascertain that such one is living at the time of the sale. Slight diligence will always enable him to acquire such information, and it certainly works no hardship upon him to be required to do so. The judgment is affirmed.

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Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

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CASE 81—ACTION FOR DAMAGES FOR BREACH OF CONTRACT  
—MAY 24.

Fairmount Glass Works v. Crunden-Martin  
Wooden Ware Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

**SALES OF PERSONAL PROPERTY—CONTRACT BY CORRESPONDENCE.**—To an inquiry by letter by the appellee addressed to the appellant for the lowest price with terms on ten car-loads of Mason jars complete with caps, the appellant replied fixing the price for immediate acceptance and shipment not later than May 15th. To this letter the appellee responded by telegram accepting the offer and, referring to specifications mailed. Held, The correspondence made a complete contract and appellant's refusal to furnish the articles rendered it liable for damages.

W. W. THUM AND HUMPHREY & DAVIE FOR THE APPELLANT.

1. There was no completed contract, because there was no agreement as to the numbers of the different sizes of jars, or as to the amount of the purchase price, dependent on these different sizes. Tiedeman on Sales, sec. 33; Smith v. Gowdy, 8 Allen (Mass.), 566; Newmark on Sales, sec. 30; Fairview v. Facey, Law Reports, Appeal Cases, for 1893, p. 552; Am. & Eng. Ency. of Law (2d ed.), vol. 7, p. 138; Adams v. Greenwood, 69 Mich., 215; Beaupre v. Pac. Co., 21 Minn., 155; Moulton v. Kershaw, 48 Am. Rep., 516 (59 Wis., 316).
2. There was no adequate allegation, nor was there any adequate proof of any "custom" that would make this a completed contract. Eagle Dist. Co. v. McFarland, 14 Ky. Law Rep., 860; Houston v. Peters, 1 Met., 562; Jones on Construction of Commercial Contracts, secs. 110 and 112.
3. The defendant's letter only related to jars of *medium* quality. Plaintiff's letter proposed jars of "strictly first quality." This was not an acceptance, in the terms of the offer, and therefore there was no completed contract. Sweat v. Shumway, 3 Am. Rep., 471 (102 Mass., 365); Richardson v. Niles, 78 Am. Dec., 293 (11 Oh. St., 55); Hart v. Hoey, 35 Am. Dec., 573; 23 Wend., 350; Newmark on Sales, sec. 33.
4. Defendant's letter was for the delivery at East St. Louis, "Ill." Plaintiff proposed the delivery to be in St. Louis, Mo., and at

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Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

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the homes of plaintiff's customers. This was a rejection of our offer, and a new proposition. Newmark on Sales, sec. 40; Bishop on Contracts, sec. 373; Sawyer v. Brossart, 56 Am. Rep. 371; Potts v. Whitehead, 23 N. J. Eq., 512.

5. Defendant's letter required the plaintiff to say whether he would pay by sixty days' acceptance, or in cash with two per cent. off. The plaintiff never accepted that part of the proposition, by saying which he would do. Therefore there was no completed trade. Potts v. Whitehead, 23 N. J. Eq., 512; Newmark on Sales, sec. 30, 41.
6. Defendant's letter was for a sale of ten car-loads as an entirety, and the law implied the right in defendant to select the days of delivery, and the number of deliveries. Plaintiff rejected this by proposing to split the deliveries into ten days, the plaintiff to have the right to name the different sizes of jars to be delivered each day, and the dates of each delivery. This was equivalent to a rejection of our proposition, and a counter offer. Waddington v. Oliver, 2 Bosanquet & Puller, N. S., p. 61; Metz v. Albrecht, 52 Ill., 492; Bishop on Contracts, sec. 785; Newmark on Sales, sec. 129; Benjamin on Sales, sec. 519; Williamson v. Johnston, 4 Mon., 253; Smith v. Quincy, 4 Greenleaf, 500; Wheeler v. New Brunswick R. R., 115 U. S., 38; Benjamin on Sales, sec. 1023.
7. Plaintiff's petition was not sufficient to support a judgment for anything beyond nominal damages, because it failed to allege any facts showing that the market price of jars had risen within the contract period, or that the plaintiff had endeavored to buy them in the market at the contract price and could not do so. Ky. Tobacco Assn. v. Ashby, 9 Ky. Law Rep., 111; Miles v. Miller, 12 Bush, 137; Sedgwick on Damages, sec. 1261; Thompson v. Gould, 16 Abbott's Practice Reports, N. S., 424; Richardson v. Jones, 1 Nev., 408; Roae v. Perry, 8 Yerger, 157.

**O. A. WEHLE AND A. M. RUTLEDGE FOR APPELLEE.**

1. Where in an answer to an inquiry by a merchant for the lowest price which the manufacturer would make to him for a definite quantity of goods the manufacturer mentions prices, time, and place of delivery, and terms of payment "for immediate acceptance," the answer is not merely a price list, but an offer, though the words "we quote you" are used. Fitzhugh v. Jones, 6 Munf., 83; distinguished from Smith v. Gowdy, 6 Allen, 566; Fairview v. Facey, L. R. App. Cases, 1893, p. 552; Thomas v. Greenwood, 69 Mich., 215; Beaupre v. Telegr. Co., 21 Minn., 155, and Moulton v. Kershaw, 59 Wis., 316, cited for appellants.
2. Where an offer to sell ten car-loads of goods—a car-load being

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Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

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one hundred gross of any size—mentions the different prices for the different sizes without specifying the quantity of each size, the acceptance of the offer constitutes a valid contract, the one or the other party, according to the terms of the contract or custom, having after the contract is closed the right of electing one of the several possible modes of performance. *Dambman Bros. v. Lorentz*, 70 Md., 382; *Smith v. Quincy*, 4 Greenl., 500; *Wheeler v. R. R. Co.*, 115 U. S., 34; *Jenkins v. Green*, 27 Beav. Ch., 436; *Williamson v. Johnston*, 4 Mon., 253; *Thomas v. Greenwood*, 69 Mich., 215; *Metz v. Albrecht*, 52 Ill., 492. So, in regard to dates of delivery: *Wheeler v. R. R. Co.*, *supra*; *Sousely v. Burns*, 10 Bush, 87, and as to terms of payments, *Rugg v. Weir*, 16 C. B. U. S., 471.

3. Where in a mercantile negotiation one party makes to the other an offer in a form which presents several modes of performance and shows indifference as to the mode of performance, he thereby intends to give to the other party the right of electing the mode of performance. *Sousely v. Burns*, 10 Bush, 87.
4. It is a question of construction which party to a contract has the election among several possible modes of performance. *Dambman v. Lorentz*, 70 Md., 382; *Smith v. Quincy*, 4 Greenl., 500; *Thomas v. Greenwood*, 69 Mich., 215; *Metz v. Albrecht*, 52 Ill., 492. Only if the contract is not capable of construction the ancient rule laid down by Coke prevails which gives the election to the first agent. *Jenkins v. Green*, 27 Beav., 436; *Wheeler v. R. R. Co.*, 115 U. S., 34. If the party who has the right of election refuses to perform, the right of election passes to the other side. *Williamson v. Johnston*, 4 Mon., 253.
5. If after the acceptance of an offer has closed the contract, one party, by subsequent communication, asks for or suggests a modification of the terms, this neither shows that the minds have not met, nor justified rescission, but the other party must make tender according to the terms of the contract. *Wheeler v. R. R. Co.*, 15 U. S., 34.
6. A suggestion of modification of terms in a letter subsequent to the acceptance can not make the letter conditional. *Hutchinson v. Blakeman*, 3 Met., 80. Even if the suggestion of or requirement for modification of the terms comes in the same letter which contains the acceptance of the offer, it will not prevent a contract from arising, if it be clear from the context that the acceptance is not intended as a conditional acceptance. *Fitzhugh v. Jones*, 6 Munf., 83; *Matteson v. Scofield*, 27 Wis., 671; *Phillips v. Moore*, 71 Me., 81; *Cheney v. Eastern Transportation Line*, 59 Md., —, distinguished from *Blakeman v. Hutchinson*, 3 Met., 80, and from *Sawyer v. Brossart*, 67 Ia., —; *Beat-*

## Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

- tie v. Allison, 77 Ia., —; Hutchinson v. Bowker, 5 M. & W., 535; Potts v. Whitehead, 23 N. J., 29; Appleby v. Johnson, L. R., 9 C. P., cited for appellants.
7. Whether the terms of the acceptance are identical with those offered is a question of fact, where they are apparently not so. Hutchinson v. Bowker, 5 M. & W., 535.
  8. A custom of trade to explain unexpressed terms of the contract may be proved without being pleaded. Lowe v. Lehman, 15 Ohio St., 179; Breen v. Moran, 53 N. W., 755; Hewitt v. John Weeks Lumber Co., 77 Wis., 548. Otherwise where custom gives unusual significance to terms used. McKee v. Wild (Ia.), 71 N. W. R., 958. Cases dist. from Eagle Dist. Co. v. McFarland (Sup. Ct.), 14 Ky. Law Rep., 860.
  9. Where only general damages are claimed at the trial for the breach of a contract of sale the petition need not contain a particular statement of the damage, but only a statement that the plaintiff is damaged by the breach and of the amount of damage claimed. Chitty on Contr. 1, side p. 338; 2 (269, 270); 5 Am. & Eng. Ency. of Pl. & Pr., 711, 717; Peters v. Cooper, 95 Mich., 191; Riverside Coal Co. v. Holmes, 36 Neb., 858; Richter v. Meyers, 5 Ind. App., 133; Canover v. Malinke, 71 Wis., 108; distinguished from Kentucky Tobacco Assn. v. Ashby, 9 Ky. Law Rep., 111; Miles v. Miller, 12 Bush, 137; Richardson v. Jones, 1 Nev., —; Rose v. Perry, 1 Yerg., —; Thompson v. Gould, 16 Abb. P. 512 cited. The statement that the damages claimed are the difference between contract and market price satisfies even the cases in 16 Abb. P. R. and 1 Nev., Miles v. Miller cited. The statement in a petition asking for general damages on an erroneous principle of calculation does not hurt. Hudson v. Archer, 55 N. W. R., 1099.

## JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

On April 20, 1895, appellee wrote appellant the following letter:

"St. Louis, Mo., April 20, 1895. Gentlemen: Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars, complete, with caps, packed one dozen in case, either delivered here, or f. o. b. cars your place, as you prefer. State terms and cash discount. Very truly, Crunden-Martin W. W. Co."

To this letter appellant answered as follows:

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Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

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"Fairmount, Ind., April 23, 1895. Crunden-Martin Wooden Ware Co., St. Louis, Mo.—Gentlemen: Replying to your favor of April 20th, we quote you Mason fruit jars, complete, in one-dozen boxes, delivered in East St. Louis, Ill.: Pints, \$4.50; quarts, \$5.00; half gallons, \$6.50 per gross, for immediate acceptance, and shipment not later than May 15, 1895; sixty days' acceptance, or 2 off, cash in ten days. Yours truly, Fairmount Glass Works.

"Please note that we make all quotations and contracts subject to the contingencies of agencies or transportation, delays or accidents beyond our control."

For reply thereto, appellee sent the following telegram on April 24, 1895:

"Fairmount Glass Works, Fairmount, Ind.: Your letter twenty-third received. Enter order ten car loads as per your quotation. Specifications mailed. Crunden-Martin W. W. Co."

In response to this telegram, appellant sent the following:

"Fairmount, Ind., April 24, 1895. Crunden-Martin W. W. Co., St. Louis, Mo.: Impossible to book your order. Output all sold. See letter. Fairmount Glass Works."

Appellee insists that, by its telegram sent in answer to the letter of April 23d, the contract was closed for the purchase of ten car loads of Mason fruit jars. Appellant insists that the contract was not closed by this telegram, and that it had the right to decline to fill the order at the time it sent its telegram of April 24th. This is the chief question in the case. The court below gave judgment, in favor of appellee, and appellant has appealed, earnestly insisting that the judgment is erroneous.

We are referred to a number of authorities holding that a quotation of prices is not an offer to sell, in the sense

that a completed contract will arise out of the giving of an order for merchandise in accordance with the proposed terms. There are a number of cases holding that the transaction is not completed until the order so made is accepted. 7 Am. & Eng. Enc. Law (2d Ed.), p. 138; Smith v. Gowdy, 8 Allen, 566; Beaupre v. P. & N. A. Telegraph Co., 21 Minn., 155.

But each case must turn largely upon the language there used. In this case we think there was more than a quotation of prices, although appellant's letter uses the word "quote" in stating the prices given. The true meaning of the correspondence must be determined by reading it as a whole. Appellee's letter of April 20th, which began the transaction, did not ask for a quotation of prices. It reads: "Please advise us the lowest price you can make us on our order for ten car loads of Mason green jars. . . . State terms and cash discount." From this appellant could not fail to understand that appellee wanted to know at what price it would sell it ten car loads of these jars; so when, in answer, it wrote: "We quote you Mason fruit jars . . . pints \$4.50, quarts \$5.00, half gallons \$6.50 per gross, for immediate acceptance; . . . 2 off, cash in ten days,"—it must be deemed as intending to give appellee the information it had asked for. We can hardly understand what was meant by the words "for immediate acceptance," unless the latter was intended as a proposition to sell at these prices if accepted immediately. In construing every contract, the aim of the court is to arrive at the intention of the parties. In none of the cases to which we have been referred on behalf of appellant was there on the face of the correspondence any such expression of intention to make an offer to sell on the terms indicated.



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Fairmount Glass Works v. Crunden-Martin Wooden Ware Co.

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In *Fitzhugh v. Jones*, 6 Munf., 83, the use of the expression that the buyer should reply as soon as possible, in case he was disposed to *accede* to the terms offered, was held sufficient to show that there was a definite proposition, which was closed by the buyer's acceptance. The expression in appellant's letter, "for immediate acceptance," taken in connection with appellee's letter, in effect, at what price it would sell it the goods, is, it seems to us, much stronger evidence of a present offer, which, when accepted immediately closed the contract. Appellee's letter was plainly an inquiry for the price and terms on which appellant would sell it the goods, and appellant's answer to it was not a quotation of prices, but a definite offer to sell on the terms indicated, and could not be withdrawn after the terms had been accepted.

It will be observed that the telegram of acceptance refers to the specifications mailed. These specifications were contained in the following letter: "St. Louis, Mo., April 24, 1895. Fairmount Glass Works Co., Fairmount, Ind.—Gentlemen: We received your letter of 23d this morning, and telegraphed you in reply as follows: 'Your letter 23d received. Enter order ten car loads as per your quotation. Specifications mailed,'—which we now confirm. We have accordingly entered this contract on our books for the ten cars Mason green jars, complete, with caps and rubbers, one dozen in case, delivered to us in East St. Louis, at \$4.50 per gross for pint, \$5.00 for quart, \$6.50 for one-half gallon. Terms, sixty days' acceptance, or 2 per cent. for cash in ten days, to be shipped not later than May 15, 1895. The jars and caps to be strictly first quality goods. You may ship the first car to us here assorted: Five gross pint, fifty-five gross quart, forty gross one-half gallon. Specifications for the remaining nine cars we will send later. Crunden-Martin W. W. Co."

It is insisted for appellant that this was not an acceptance of the offer as made; that the stipulation, "The jars and caps to be strictly first-quality goods," was not in their offer; and that, it not having been accepted as made, appellant is not bound. But it will be observed that appellant declined to furnish the goods before it got this letter, and in the correspondence with appellee it nowhere complained of these words as an addition to the contract. Quite a number of other letters passed, in which the refusal to deliver these goods was placed on other grounds, none of which have been sustained by the evidence. Appellee offers proof tending to show that these words, in the trade in which parties were engaged, conveyed the same meaning as the words used in appellant's letter, and were only a different form of expressing the same idea. Appellant's conduct would seem to confirm this evidence.

Appellant also insists that the contract was indefinite, because the quantity of each size of the jars was not fixed, that ten car loads is too indefinite a specification of the quantity sold, and that appellee had no right to accept the goods to be delivered on different days.

The proof shows that "ten car loads" is an expression used in the trade as equivalent to 1,000 gross, 100 gross being regarded a car load. The offer to sell the different sizes at different prices gave the purchaser the right to name the quantity of each size, and, the offer being to ship not later than May 15th, the buyer had the right to fix the time of delivery at any time before that. *Sonsely v. Burns' Adm'r*, 10 Bush, 87; *Williamson's Heirs v. Johnston's Heirs*, 4 T. B. Mon., 253; *Wheeler v. N. B. Railroad Co.*, 115 U. S., 34 [5 Sup. Ct., 1061, 1160].

The petition, if defective, was cured by the judgment, which is fully sustained by the evidence. Judgment affirmed.

East Tennessee Telephone Co., &c., v. City of Russellville.

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CASE 82—INJUNCTION AGAINST UNLAWFUL USE OF STREETS  
—MAY 24.

East Tennessee Telephone Co., Etc. v. City of  
Russellville.

APPEAL FROM LOGAN CIRCUIT COURT.

1. MUNICIPAL CORPORATIONS—TELEPHONE FRANCHISE.—Prior to the adoption of the present Constitution the city of Russellville had no legislative power to grant the right to use the streets for the erection of telephone poles and the stringing of wires.
2. SAME—EFFECT OF CONSTITUTION.—Section 163 of the Constitution does not confer a right on a telephone company to use the streets of a municipality for that purpose without municipal consent unless (1) the right existed by charter antecedently and (2) that work had been begun thereunder in good faith. Neither condition existed in this case.

SELDEN Y. TRIMBLE FOR THE APPELLANT. (S. R. CREWDSON  
AND WILBUR F. BROWDER OF COUNSEL.)

1. The special demurrer to the petition should have been sustained. There is no such corporation as "City of Russellville." The corporate name is "Mayor and Councilmen of Russellville." Act of the Gen. Assm., approved May 1, 1880; Act of Sept. 30, 1892; Ky. Stats., secs. 2741, 1180, 3615.
2. The court erred in sustaining a demurrer to the answer; (a) the first paragraph was a traverse of the material allegations of the petition, (b) the affirmative defense relied on in the second paragraph of the answer was not a waiver of the traverse contained in the first.
3. The appellant having obtained consent of the proper legislative Board of Russellville, a proper construction of section 163 of the Constitution would be that appellants were thereby permitted to erect its poles over the streets of Russellville at the time they did so. Section 3650 of the Kentucky Statutes operated to validate the ordinance granting the appellant's franchise.
4. The city of Russellville had an inherent right to permit and regulate the use of its streets for telephone purposes and an injunction ought not to have been granted to destroy a work of

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East Tennessee Telephone Co., &c., v. City of Russellville.

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so much public policy. *Lexington & O. Ry. v. Applegate, &c.*, 8 Dana, 298.

**JAMES H. BOWDEN ON THE SAME SIDE. (BROWDER & BROWDER  
AND S. R. CREWDSON OF COUNSEL.)**

1. Telephone lines were intended to be included in section 199 of the Constitution and this section constitutes a legislative grant to such companies to use the streets of cities.
2. Under section 156 when a company reached the city limits in the construction of its line, if the city refused to designate where and under what terms the lines should be built, either the company might make its own selection or by mandamus compel the city to act.
3. Section 164 has no application to the facts of this case; it is limited to a case where the city itself creates the franchises.
4. Nor is section 191 applicable; it was aimed at speculative charters. These constitutional provisions relate to such grants of special or exclusive privileges as are not only exclusive in terms or fact but are also substantially so in character—being sources of corporate power and having no application to a case where a substantial grant is made by general law and where the city can do no more than regulate the exercise of the power granted.

**S. R. CREWDSON ON THE SAME SIDE.**

1. Section 191 of the present Constitution did not operate to repeal the franchise previously granted to Clark by ordinance passed November 18, 1890.
2. The right of telephone companies to erect poles and string wires within the State is a general one, subject only to the restriction that a municipality may prescribe the place where and the regulations under which the same may be done.
3. The city should be estopped from instituting proceeding to remove the poles and wires of the appellant on account of great public inconvenience that would thereby result.

**W. P. SANDIDGE FOR THE APPELLEE.**

1. The municipal council of the city of Russellville before the adoption of the present Constitution had no authority or power to grant to any person or corporation a right to use the streets and alleys for any purpose other than that for which they were dedicated. 13 Ky. Law Rep., 705; 92 Ky., 149; 10 Ky. Law Rep. 766; 4 Ky. Law Rep., 727; 1 Bush, 204.
2. The right to use the streets for telephone purposes is an additional servitude and can not exist without municipal sanction. *City of Newport v. Newport Light Co.*, 84 Ky., 166; 13

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East Tennessee Telephone Co., &c., v. City of Russellville.

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Ky. Law Rep., 705; 10 Ky. Law Rep., 766; 11 Ky. Law Rep., 841; 8 Dana, 289.

3. The city's attempt to grant authority was void.
4. A street could not before the adoption of the present Constitution be subject to any additional servitude without authority from the General Assembly, and the erection of a line of telephone poles is an imposition of a new and additional servitude. 47 Am. Rep., 453; 42 N. J., Eq., 141; 49 N. J. L., 344; 86 Va., 696; 19 Am. St. Rep., 908; 24 Am. St. Rep., 290; 50 N. Y. Supp., 488; 49 Fed. Rep., 113.

H. S. McCUTCHEN ON THE SAME SIDE. (E. G. VICK, JOHN S. RHEA AND CRADDOCK & SANDIDGE OF COUNSEL.)

On the validity of the alleged franchises. Ky. Stats., ch. 89, art. 6; Constitution, secs. 163, 164, 191, 199; Ky. Stats., sec. 3636.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

Previous to the adoption of the present Constitution, the council of a municipal corporation, without legislative authority, could not grant to any person or corporation the right to use the streets and alleys of a city or town for any purpose other than for which they were dedicated. The streets and alleys of a city or town are intended for public travel, and, when an additional servitude is placed upon them, it is in derogation of common right. *Ruttles v. City of Covington* (10 Ky. Law Rep., 766), [10 S. W., 644]; *Com. v. City of Frankfort*, 92 Ky., 149. [17 S. W., 287].

In *City of Newport v. Newport Light Co.*, 84 Ky., 166, the court, in considering the question of the right of a gas company to use the streets to enable it to lay down its pipes, said: "It may be regarded, however, as well settled that the right to use the streets of a city by a gas company to enable it to lay down its pipes is a franchise that can be granted only by the Legislature, or some local or municipal authority authorized to confer it." (*Dillon on Municipal Corporations*, second column, section 691.)

"However it may be as respects the power of the Legisla-

East Tennessee Telephone Co., &c., v. City of Russellville.

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ture to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council, unless it be plainly conferred by express words, or by necessary or at least reasonable implication." (Id., sec. 695.)

Section 163 of the Constitution, to which we will hereafter refer, recognizes that to occupy the streets and alleys of a city or town with telephone poles and wires is an additional servitude, by refusing telephone companies the right to enter upon the streets and alleys of a city or town without the consent of the proper legislative bodies or boards of such city or town being first obtained. It is the imposition of a new and additional servitude on streets and alleys of a city or town to erect telephone poles and string wires thereon. Board of Trade Telegraph Co. v. Barnett, 47 Am. Rep., 453; Broome v. New York & New Jersey Telephone Co., 42 N. J. Eq., 141 [7 Atl., 851]; Western Union Telegraph Co. v. Williams, 86 Va., 696 [19 Am. St. R., 908; 11 S. E., 106]; Stowers v. Postal Telegraph Cable Co., 24 Am. St. R., 290 [9 South., 356]; Pacific Postal Telegraph Cable Co. v. Irvine, &c., 49 Fed. Rep., 113.

On November 18, 1890, the Board of Councilmen of the city of Russellville granted to J. W. Clark, "for ten years, exclusive franchise for the purpose of erecting a system of telephone lines in that city." At that time the councilmen of that city had no legislative authority, express or implied, which authorized them to grant such a privilege to him. He enjoyed no charter privilege which conferred upon him the right to occupy the streets and alleys of that city for the purposes stated. The date of the grant of the privilege shows that it was before the adoption of the present Constitution.

Previous to February 8, 1893, a motion was entered before the Board of Councilmen to the effect that Clark be

given sixty days in which to commence operations on his telephone system; and, after considering the motion, they, on February 8, 1893, rejected the proposition, for the reason, as given by them, that upon investigation they found that under the present Constitution he did not enjoy the right to erect a telephone line in the city. Afterwards Clark proceeded to erect his telephone line, placed poles on the streets and alleys of the city, strung wires upon them, and seems to have been operating it when, in 1896, the East Tennessee Telephone Company purchased the telephone line from him, claiming that it had been granted the privilege by the board of councilmen in 1884 to erect a telephone line over the streets and alleys of the city. The right to have erected this telephone line, and to maintain the same, is claimed to exist by virtue of the action of the board of councilmen in granting the privilege to Clark in 1890; and, further, as the telephone company had been granted the privilege in 1884 to erect a telephone line in the city, it had the right to acquire his interest in the telephone line, and therefore the city has no right to compel the removal of the present poles from the streets and alleys of the city, or to prevent it from planting additional ones. It may be added here that the board of councilmen of the city had no legislative authority to grant the privilege to the telephone company to erect a telephone line in the city. Section 163 of the constitution reads as follows: "No street railway, gas, water, steam heating, telephone, or electric light company, within a city or town, shall be permitted or authorized to construct its tracks, lay its pipes or mains, or erect its poles, posts or other apparatus along, over, under or across the streets, alleys or public grounds of a city or town, without the consent of the proper legislative bodies or boards of such city

or town being first obtained; but when charters have been heretofore granted conferring such rights, and work has in good faith been begun thereunder, the provisions of this section shall not apply." It will be seen from this section of the constitution that no authority is vested anywhere to authorize any telephone company to construct its line on or across the streets and alleys or the public grounds of a city or town, except with the consent of the proper legislative bodies or boards of such city or town. No such authority was obtained by Clark or the telephone company, and it necessarily follows that they had no right to enter upon the streets and alleys of the city for the purposes stated. To hold otherwise would be to utterly ignore and disregard the organic law of the State. When a telephone company takes possession of the streets and alleys of a city or town without the consent of the legislative bodies or boards of the city or town, it has no more right to occupy the streets and alleys than any wrong-doer has who takes possession of the land of another without his consent. The last paragraph of section 163 is to the effect that when charters had been theretofore granted conferring such rights, and work had in good faith been begun thereunder, the section does not apply.

There is no pretense in this case that Clark had any charter which authorized him to build a telephone line over the streets and alleys of the city of Russellville; neither is it pretended that the charter of the telephone company conferred any such right. So neither of them had charters which conferred such rights. Nor had they commenced work, in good faith or otherwise, for the purposes of erecting the telephone line, when the present Constitution was adopted. As the action of the Board of Councilmen previous to the adoption of the present Constitution was invalid, no



rights accrued to Clark or the telephone company thereunder. They had no rights to be recognized by the provisions of the Constitution. It was not the purpose of the Constitution to render valid a resolution of a Board of Councilmen, which, under the law at the time of its adoption was invalid. The fact that the provisions of the Constitution only relate to rights which accrued by virtue of charters, and that these charters were not to operate to give consent to the use of streets and alleys of a city or town, except work had commenced in good faith, shows that no effect was intended to be given to any unauthorized action of city authorities which had been taken before the adoption of the Constitution.

It is suggested that section 3650, Kentucky Statutes, which reads as follows, "All laws, ordinances, by-laws and resolutions now in force in said cities, and not inconsistent with this chapter, shall remain in full force until altered or repealed by ordinance," validates the ordinance granting the appellant's franchise. By the express terms of this section, it only keeps in force ordinances, by-laws, and resolutions which were in force at the time the act for the government of cities of the fifth class became a law. The franchise which the common council attempted to give Clark and the telephone company was not even in force at the time of the adoption of the Constitution; and, had the franchise been granted by a charter then, it would have been invalid, unless work in good faith had been begun under it before the adoption of the Constitution.

The judgment is affirmed.

Louisville Bridge Company v. Louisville & Nashville R. R. Co.

CASE 83—ACTION ON CONTRACT—MAY 24.

Louisville Bridge Company v. Louisville & Nashville R. R. Co.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. **CONTRACTS—CONTRIBUTION TO BRIDGE RENTAL—DAMAGES FOR BREACH.**—Appellee and other railroad companies entered into an agreement with appellant to contribute in proportion to the business done, a rental which would cover appellant's fixed charges and create a sinking fund to pay appellant's bonded indebtedness, with the further provision that the rental should be reduced in proportion to the increase of the sinking fund and the contribution which other roads might make to the aggregate rental. The other participating roads received rebates on rentals paid but the appellee did not. In an action against the appellant to recover overcharges on rentals it is held that plaintiff is entitled to a judgment to an amount of its overcharges estimated on the traffic basis; and that it was no defense to the action that the traffic reports which the appellee covenanted to make were made by its connecting lines and not by appellee itself.
2. **SAME.**—Plaintiff in an action for breach of contract is not precluded from recovery by failing to comply with a stipulation inserted for its own benefit and in which the other contracting parties have no interest.

**HUMPHREY & DAVIE FOR THE APPELLANT. (GIBSON, MARSHALL & GIBSON OF COUNSEL.)**

1. Effect of reformed petitions upon former pleadings filed in the cause: *Smith v. Pelot*, 65 Hun, 631; *Holmes v. Jones*, 121 N. Y., 461; *Mulligan v. Ill. Cent. Ry. Co.*, 36 Ia., 181; *Brown v. Pickard*, 4 Utah, 492.
2. On practical construction of a contract. *Louisville Turnpike Co. v. Shadburne*, 1 Ky. Law Rep., 325; *Thompson v. Thompson*, 2 B. M., 166; 11 Am. & Eng. Ency. of Law, 518.
3. When money can be recovered as paid by mistake. *Tyler v. Smith*, 18 B. M., 797.
4. What contracts are mutual and dependent. 7 Am. & Eng. Ency. of Law, 120, 121; *McLure v. Rush*, 9 Dana, 65; *Allen v. Saunders*, 7 B. M., 592; *Irwin v. Lee*, 34 Ind., 321.
5. Duty of a party to minimize his damages. 1 *Sutherland on Damages*, 148; *Miller v. Mariner's Church*, 7 Greenleaf, 51.

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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**HELM, BRUCE & HELM FOR APPELLEE.**

1. When a bridge company makes a contract with several railroad companies for the use of the bridge, and agrees that upon signing the agreement it will so fix and maintain its rates as not to produce, in the aggregate, a sum exceeding certain sums named in the contract, and that the tolls shall never be more to one railroad company than to another, it has no right to maintain its tolls at such rates as to produce an aggregate sum greater than that named in the contract, and if it does so, it comes under obligation to see to it that the surplus thus improperly created is redistributed to the railroad companies in the proportion of their several contributions to the tolls.
2. If the bridge company, after having improperly created the surplus, disposes of it by crediting back or redistributing the whole surplus to some of the companies, exclusive of another, it is as much a breach of contract as if there had been a difference made in the first instance in the tolls charged to those companies.
3. The bridge company, having consented that the Louisville & Nashville Railroad Company might pay its share of the established published toll rates to its connecting carriers, which were in turn to account to the bridge company for them, those companies became the agents of the bridge company for the purpose of those collections, and it can not escape liability in a suit upon the contract to recover the Louisville & Nashville Railroad Company's share of the surplus, by showing that the Louisville & Nashville Railroad Company had not paid directly to the bridge company, the performance of that covenant having been expressly waived.
4. Knowing that the connecting carriers of the Louisville & Nashville Railroad Company had collected from it its proportion of the full published toll rates for the use of the bridge company, and that a large surplus would be created by the exaction of the full published toll rates from all the companies, it was the duty of the bridge company to see to it that the surplus thus created should be redistributed in proportion to contributions, and then the bridge company, recognizing this obligation, actually credited on its books the Louisville & Nashville Railroad Company and debited the connecting carriers respectively, with the tolls on the traffic interchanged between them respectively and the Louisville & Nashville Railroad Company, this duty of the bridge company to collect the amounts from the connecting carriers thus debited to them and credited to the Louisville & Nashville Railroad Company, fixes an undoubted obligation on the bridge company to account to the Louisville

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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& Nashville Railroad Company for the amount with which it is credited on the books of the bridge company, and, if, in order to realize that money, it must first collect it from the connecting carriers, its primary duty to the Louisville & Nashville Railroad Company is not lessened thereby, the whole situation having been created in the first place by the bridge company's breach of contract in exacting excessive tolls.

5. Where the bridge company collects from some of the connecting carriers the amounts thus debted to them on account of the Louisville & Nashville Railroad Company's share of the surplus, and uses the money in its own business, it is liable to the Louisville & Nashville Railroad Company for not only the amount collected, but for interest as well on those amounts from the time they should have been paid over, and if it has disabled itself by a contract to which the Louisville & Nashville Railroad Company was not a party, from making collection from one of these companies it is nevertheless bound for the amount with interest from the time it should have collected and paid over to the Louisville & Nashville Railroad Company. Schmidt, Trustee, v. Louisville, Cincinnati & Lexington Railway Co., 95 Ky., 290.

**SAME COUNSEL FOR APPELLANT IN A PETITION FOR A REHEARING.**

**SAME COUNSEL FOR APPELLEE IN RESPONSE TO THE PETITION FOR A REHEARING.**

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

This suit was instituted by appellee against the Louisville Bridge Company, the Jeffersonville, Madison & Indianapolis Railroad Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Ohio & Mississippi Railway Company, the Louisville, New Albany & Chicago Railway Company, and the Louisville, Evansville & St. Louis Consolidated Railway Company to recover, under a contract made on the 5th day of June, 1872, excessive tolls alleged to have been collected from it by the Louisville Bridge Company for the years 1892, 1893, 1894, and 1895. The clauses of that contract which are essential to the determination of this case are the first, second, third, fifth, and sixth, which are as follows:

“Agreement made this fifth day of June, 1872, between

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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the Louisville Bridge Company, party of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company, party of the second part, the Ohio & Mississippi Railway Company, party of the third part, and the Louisville & Nashville Railroad Company, party of the fourth part, witnesseth:

"Whereas, the first party owns the bridge over the Ohio river at Louisville, between the Commonwealth of Kentucky and the State of Indiana, with the approach thereto on the south or Kentucky side thereof, its capital stock being fifteen hundred thousand dollars, and its mortgage debt eight hundred thousand dollars, bonds for said debt being issued, for one thousand dollars each, dated the first day of December, 1868, and payable twenty years after said date, with interest at seven per cent. per annum, payable semi-annually in gold on the first day of June and the first day of December, principal and interest payable at the Bank of America, New York City; and whereas, the second party owns the approach to said bridge on the north or Indiana side thereof, and the railroad connecting therewith; and whereas, the third party owns a railroad connecting with the railroad of the party of the second part at or near the north end of said approach; and whereas, the party of the fourth part owns a railroad terminating in the city of Louisville and connecting with the track over and across the said bridge. Now, this agreement witnesseth, in consideration that the second, third, and fourth parties agree respectively to use said bridge as hereinafter covenanted, the first party hereby covenants and agrees jointly and severally with the second, third, and fourth parties, their successors and assigns, respectively, that the tolls and charges over and for the use of said bridge and its tracks owned by the first party, in the transportation of

freights, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties, per ton, and per passenger, or per car, engine, or other means of transfer, over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge and the said approach owned by the first party, paying a dividend semi-annually of six per cent. on said capital stock of fifteen hundred thousand dollars, the interest upon said bonds as the same matures and becomes payable, a sinking fund sufficient to pay off said bonds of eight hundred thousand dollars at maturity, the amount necessary to keep up the corporate organization of the party of the first part, with its proper officers and servants, and such taxes as may be chargeable against such bridge company on said bridge or other property pertaining thereto or otherwise; and it is understood and mutually agreed that the said charges and tolls shall from year to year be reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund, and that said toll and charges shall always be the same to each of the second, third, and fourth parties, and that the tolls and charges to other railroads or railroad companies for like use of said bridge and the approach owned by the first party shall not be less than those charged to or incurred by the parties hereto. And all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties.

"Sec. 2. The first party shall keep in repair, maintain,

and renew such bridge and its appurtenances and the tracks and approach thereto, owned by the first party. If, however, said bridge or its appurtenances shall be injured by flood, ice, or other casualty, or by crystallization of the iron or other inherent decay, so as to render the same useless or dangerous, and it shall become necessary to rebuild the whole or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of current rates and charges, then and in every such case it is mutually agreed between the parties that the first party shall issue bonds secured by mortgage on said bridge and its appurtenances and appendages owned by the first party, at a rate of interest not exceeding seven per cent. per annum in gold, payable semi-annually, principal payable in forty years, and to an amount sufficient to yield a fund equal to the expenses of renewing and repairing said bridge; and the proceeds of said bonds shall be applied to that purpose, in which event the tolls and charges for the use of said bridge, as hereinbefore provided, shall be increased so as to cover and provide for the payment of the interest on said bonds, and a sinking fund to retire and take up said bonds at maturity.

"Sec. 3. In consideration of the premises, the second and third parties each severally covenant for itself, its successors and assigns, with the first party, its successors and assigns, that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads to and from Louisville, and to and from points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them, respectively, of said bridge, and the tracks

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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and approaches thereto, owned by the first party; and the party of the fourth part for itself, its successors and assigns, covenants with each of the parties of the first, second, and third parts, their respective successors and assigns, that it will deliver to the said party of the first part, to be passed over the said bridge, or to the parties of the second part or third part, or to such other railroad company or companies as may for the time being be transporting freight, passengers, mails, express matter, and other goods over the said bridge, all the freight, passengers, mails, express matter, and other goods carried on and over its road or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio river at or near Louisville during the existence of this agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of toll and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party."

"Sec. 5. Accounts of all expenditures, tolls, and charges and payments required by the terms of this agreement shall be kept by the party authorized by this agreement to charge the same against either of the parties hereto, the account of tolls, however, to be kept by the respective parties chargeable therewith; and all such accounts shall be rendered to the proper parties during the month next succeeding the accruing of the items thereof, and the same shall be settled and paid within thirty days after the rendition of each monthly account.

"Sec. 6. If it is found, during the month of May or November in any year, that the tolls and charges herein provided are not sufficient to meet the said interest and divi-



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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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dend due the first day of the next succeeding month, the parties of the second and third parts each covenant and agree separately with the first party, and mutually covenant each with the other, to advance and pay the deficit immediately and pro rata according to the aggregate amount of tolls and charges for the use of said bridge against each for the current six months. The said advance, with interest thereon at the rate of seven per cent. per annum, shall be refunded by the first party out of tolls first thereafter accruing."

Under this contract the bridge company was authorized to fix such rates and charges for the use of the bridge as should produce in the aggregate not more than a sum sufficient to pay (1) the cost and expense of keeping the bridge and its approaches in repair; (2) a semi-annual dividend of 6 per cent. on the capital stock of \$1,500,000; (3) the interest upon the bonds of the company, amounting in the aggregate to \$800,000, and establishing a sinking fund sufficient to pay off the bonds at maturity; (4) the amount necessary to keep up the corporate organization of the company; (5) such taxes as may be charged against the company or its property. It was expressly agreed that these tolls and charges should be reduced from year to year as the outstanding bonds were paid off and discharged, and the interest charge thereby extinguished; that these tolls and charges should always be the same to the second, third, and fourth parties, and that the tolls and charges to other railroads for the like use of the bridge and its approach should not be less than those charged to the parties to the contract, and that all such tolls and charges paid by other railroad companies should form a part of the fund provided for the payment of the expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the sec-

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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ond, third, and fourth parties; and in consideration of this agreement the railroad companies agreed to pass over the bridge all the freight, passengers, mails, express matter • and other goods carried on and over their road to and from Louisville, and to and from points which required their passage over the Ohio river at or near Louisville, during the existence of the agreement, and to punctually pay to the party of the first part the tolls and charges due by them for the use of the bridge, tracks, and approaches thereto.

On the first day of February, 1882, the bridge company entered into an agreement with the Louisville, New Albany & Chicago Railroad Company for the use of the bridge, which was substantially in accord with the • agreement between the original contracting parties, and subsequently a similar contract was entered into with the Louisville, Evansville & St. Louis Consolidated Railroad Company for the use of the bridge.

Plaintiff alleges that it had lived up to the letter and spirit of its agreement continuously from the execution of the contract until the institution of this suit, and had delivered to the bridge company and to the several railroad companies using said bridge all passengers, freight, mail and express matter to be passed over said bridge carried on and over its road, or any part thereof, destined for any points which required their passage over the Ohio river at or near Louisville; that with the consent of the bridge company and the other railroad companies using the bridge it had, up to the filing of this suit, punctually paid for the use of the bridge, paying to the defendant railroad companies the tolls due from it on traffic passing over the bridge hauled by plaintiff, and delivered to the bridge company or to the respective railway companies; that its con-

tributions and tolls at some times had been only such parts thereof as its mileage bore to the total mileage over which the traffic was transported, but at other times it had contributed the total amount thereof. Plaintiff charges that the bridge company, upon the signing of the contract, fixed its tolls and charges, and had from time to time changed same, but had, in violation of its contract, for the years 1892, 1893, and 1894, maintained said tolls and charges at such rates as to produce a sum more than sufficient to raise the sums mentioned and declared in the contract, and had illegally refunded the whole of this excessive toll to the defendant railroad companies, and had refused to pay any part thereof to plaintiff; and that of this excess so illegally collected from the plaintiff the Pittsburg, Cincinnati, Chicago & St. Louis had received \$76,878.92, Baltimore & Ohio Southwestern Railway Company \$12,488.82, Louisville, Evansville & St. Louis Consolidated Railway Company \$43,968.70, Louisville, New Albany & Chicago Railway Company \$34,697—making the aggregate \$168,033.44—for which it seeks to hold the bridge company responsible.

The bridge company denies that plaintiff had paid to it directly any tolls on the traffic sent by it over the bridge for the years 1892, 1893 and 1894, or that it had received such tolls and charges as if paid to it by the plaintiff; and alleges that plaintiff had refused to make any reports of such traffic prior to the year 1892, and had since that time failed to pay to them the tolls due on traffic sent by it over the bridge, but had permitted this traffic to be reported by the connecting lines to whom it was delivered, who paid the tolls thereon without informing defendant what proportion thereof had been contributed by plaintiff. Defendant admits that it had maintained its tolls at a high-

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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er rate than was necessary to pay the fixed charges provided by the contract, but alleges that this was done with the assent of all the parties to the contract, and avers that plaintiff would have received its proportion of this excess if it had furnished the necessary information to enable defendant to ascertain what this proportion was as provided by the contract.

It appears that the business between the bridge company and the railroad companies was conducted in accordance with the agreement up until about the year 1879 or 1880, the surplus tolls being applied, in accordance with the terms of the contract, to the extinguishment of the bonded debt of \$800,000; that, after this was done, representatives of the bridge company and of the railroads north of the river held a meeting, of which plaintiff was not advised, and agreed that the bridge company should maintain its rates and charges at the excessive amounts, and that the surplus created by these excessive rates should be rebated back to the roads north of the river; and that from that time on large amounts were each year credited back to the roads on the north of the river. The effect of this, of course, was to deprive plaintiff of large sums of money to which it was entitled under that provision of the contract which declared that the tolls and charges should always be the same to each of the contracting railroads. The testimony shows that the contract was forgotten or overlooked by plaintiff company until about the year 1888, when plaintiff began to make demands for its proportion of the surplus earnings, and to insist upon a reduction of the tolls to a point where they would yield only a sum sufficient to pay the amounts provided by the contract. The negotiations which followed these demands on the part of plaintiff culminated in a meeting between the par-

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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ties in January, 1892, in which plaintiff's contention was admitted by the Pittsburgh, Cincinnati, Chicago & St. Louis, and subsequently by the Baltimore & Ohio South-western Railway Company and the Louisville, Evansville & St. Louis Consolidated Railway Company, who thereafter paid to the bridge company the various sums of money which had been previously credited to them by the bridge company, and which, under the contract, was due to plaintiff; but the Louisville, New Albany & Chicago Railway Company refused to pay back the proportion of this excess which had been credited by the bridge company to it upon several grounds: First, they insisted that plaintiff was not entitled to share in these excessive tolls at all; second, that, if they were, they had not been apportioned upon the proper basis; and, third, that by a contract made by them with the bridge company subsequently to the date of the original contract the bridge company had agreed to charge them a lump sum, which was not to exceed \$5,000 per month for the use of the bridge during a considerable period of time in lieu of the tolls originally agreed to be paid, and which, under the contract made with plaintiff, the bridge company was bound to collect. The testimony shows that by reason of this agreement, and the failure of the bridge company to require the Monon to pay its tolls promptly, they had fallen behind in tolls due the bridge company in a very large amount.

The evidence of the secretary of the bridge company shows that beginning with the first day of January, 1892, a full account of the tolls paid by each railroad company was kept by the bridge company from information furnished by the railway companies, and at the end of each quarter of a year thereafter the bridge company issued quarterly reports showing the total amounts of tolls so col-

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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lected, by whom they were paid, and the amount of the surplus, and the proportion due to each company from this excess. These reports indicate that plaintiff is entitled to the precise amount of money sued for in this action, provided the apportionment of the excess is made among the railway companies in the same proportion in which the tolls were paid by each of them to the bridge company.

Originally there was a difference in gauge between the tracks of plaintiff and the other companies, and for this reason, and with consent of all the parties, plaintiff reported its traffic to the connecting lines, and at the same time paid to them its proportion of the tolls due the bridge company, and each of them in turn reported and paid the tolls to the bridge company. It does not seem to us to be important that the freight contributed by plaintiff was delivered to connecting lines, who paid the tolls thereon to the bridge company, and this fact can not effect the right of plaintiff to recover this excessive toll which the bridge company had exacted in violation of their contract, as it appears that at least for the period covered by this suit the bridge company had as accurate information on this point as though it had been directly furnished by plaintiff.

It was the duty of the bridge company, under its undertaking with plaintiff and the other railroad companies, to make its charges uniform, and to collect its tolls. If it has failed to do so, the loss occasioned by such default should fall upon it, and not upon innocent parties. Its contract expressly required that all tolls and charges to other railroad companies for the use of the bridge and its approach should be the same as those charged to and incurred by the railroad companies who were parties to the contract; and that all such tolls paid by other railroad

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Louisville Bridge Company v. Louisville & Nashville R. R. Co.

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companies which should afterwards use the bridge would become a part of the common fund for the payment of the fixed charges to which it was entitled under the contract.

The defendant also complains that plaintiff failed to collect the bridge tolls in excess of its transportation charges.

The testimony shows that plaintiff was forced by competition to abandon this extra charge, in order to do business. This provision was inserted for the benefit of the plaintiff, and its omission was not in any wise prejudicial to defendant, and is a matter about which defendant has no right to complain, as it is evident that they lost nothing by such omission, but, on the contrary, were greatly benefitted by the receipt of business which would otherwise not have passed over the bridge.

The dominant idea which runs through the entire contract originally entered into between the parties was that there should be absolute equality in charges made against the railroad companies for the use of the bridge, and that these charges should be limited, as far as practicable, to such rates as would produce a sum sufficient to pay off the fixed charges provided for in the contract; and it seems to us that there can be no reasonable doubt of the soundness of appellee's contention that, as the bridge company kept its tolls at an excessive rate, and in this way illegally accumulated a surplus, it belonged to the railroad companies in the exact proportion in which it had been paid by them to the bridge company, and each of them is entitled to have this excess paid back in exactly the same proportion in which it was paid.

It was the plain duty of the defendant bridge company to have restricted its charges to such rates as would have produced a sum of money sufficient to pay its legiti-

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Monarch v. Brey.

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mate charges under the contract; and as it has violated this contract, and collected from plaintiff tolls in excess of the amount authorized by the contract, it is liable therefor, with interest from the date of such illegal exactions, at least from the time it had accurate and distinct information of the amount due plaintiff from this excess.

As the judgment rendered in this case is in accordance with the views expressed in this opinion, it is affirmed.

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CASE 84—ENTRY OF JUDGMENT *NUNC PRO TUNC*—MAY 25.

## Monarch v. Brey.

## APPEAL FROM DAVIESS CIRCUIT COURT.

1. RECORDS—VERITY OF.—A motion to set aside a judgment because it was rendered on October 1st, because no court was then in session, will be overruled, the record showing that the judgment was entered on the first day of the October term.
2. PRACTICE—DISREGARDING RULES.—A rule of court that no business shall be transacted "either at common law or in equity" at the December term, may be modified by the court and an order in a civil case at that term is not error.
3. SAME—ENTRY OF JUDGMENT *nunc pro tunc*.—A record may be amended to include a judgment by default on an entry in the minute book as follows:

"Brey

"12,435 vs. Judgt.

Thomas."

4. SAME—NOTICE—MISPRISON.—Notice is not necessary for the entry of a judgment *nunc pro tunc*. Failure to enter the judgment originally is not a misprison under section 519 of the Civil Code for which notice is necessary.

## WALKER &amp; SLACK FOR THE APPELLANT.

1. At the December term the court had no jurisdiction to enter an order in a civil case, it being a criminal term only.
2. The court had no right to make a *nunc pro tunc* order and hear evidence of such order without notice to the party to be affected by it.
3. The court had no right to enter an order as of the date October 1st when no court was in session.



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Monarch v. Brey.

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4. The evidence was insufficient to authorize the entry of a judgment *nunc pro tunc*. Paducah Land Co. v. Cochran, 37 S. W. R., 67; 18 Ky. Law Rep., 466; Conn. v. Doyle, 2 Bibb., 248; Boyd County v. Ross, 95 Ky., 171; Ency. of Pld. & Pr., vol. 5, 951.

**LITTLE & LITTLE FOR THE APPELLEE.**

1. There are other clerical misprisions than those defined by section 517 of the Civil Code.
2. A clerical misprision is where a court has rendered judgment or made an order in a case, and the clerk in attempting to enter has not completed it or has omitted some part or has substituted a wholly different order or judgment from that made or rendered.
3. The correction of a clerical misprision is to set aside or modify something that has not been done correctly or add to an incomplete order or judgment.
4. Failure to enter a judgment is not a clerical misprision.
5. Notice is necessary before correcting a clerical misprision, but not before entering judgment rendered by the court, which the clerk had omitted to enter.
6. If there was a clerical misprision in this case, it consisted in rendering judgment prematurely which could not be corrected in this proceeding.
7. If the judgment was voidable as a clerical misprision, yet after having replevied it, appellant extinguished it and nothing remained to be vacated.
8. Appellant was not prejudiced by any alleged errors of which he complains, especially as the circuit court would have re-entered the judgment *nunc pro tunc* if it had been held void.

Citations: Civil Code, secs. 517-19; Gray v. Merrill, 11 Bush, 634; Graham v. Lynn, 4 B. M., 18.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

Suit was brought in the circuit court by appellee against Thomas, Simmons; and appellant Monarch upon a promissory note, and process executed in time for a judgment at the October term, at which time the court directed judgment to be entered by default; but, the papers having been mislaid, the judgment was not entered. Subsequently, at the December term, a judgment was entered reciting that the defendants had been summoned to the October term, that judgment had been rendered against them, but not

## Monarch v. Brey.

entered because the papers were mislaid, and that "this judgment is entered as of the first day of the October term, 1896, and execution may issue forthwith." Execution accordingly issued, and was replevied by Thomas and Monarch, with S. Monarch as surety. At the June term, 1897, appellee gave notice of a motion to enter a judgment *nunc pro tunc* as of the first day of the October term, and the defendants gave notice and moved to set aside as void the judgment which had been entered, appellee's motion being obviously intended to secure a judgment in the event the former judgment should be set aside as void. Both motions were overruled, and this appeal is prosecuted both from the judgment entered at the December term and the order overruling the motion to set aside.

Appellant contends that the judgment was void for several reasons:

First. Because it was rendered as of October 1st, at which time no court was in session. The record before us shows it to have been rendered as of the first day of the October term, and the question must be decided by that record.

Second. Because, by rule of the Daviess Circuit Court, it was provided that certain terms of the court, including the December term, should be known as the criminal terms, "and no civil business, either common law or equity, will be prosecuted at said terms, unless in case of actual emergency," etc. In the case of Paducah Land Coal & Iron Co. v. Cochran, Assignee, &c., 18 Ky. Law Rep., 465 [37 S. W., 67], it was held, with reference to this rule, that the judge could undoubtedly have set aside or suspended it, and that an order made in a civil suit at such criminal term was not error.

Third. That there was not sufficient evidence upon which

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Monarch v. Brey.

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to enter the judgment *nunc pro tunc*. The clerk's minutes showed an entry as follows:

"Brey  
12,435 vs. Judgt.  
Thomas."

—This entry gives the style of the case, the case number, and an abbreviation for "judgment," is quite as full as such entries upon the minutes usually are, and we think sufficient upon which to base the entry of the judgment *nunc pro tunc*.

Fourth. It is further urged that the court had no right to make the *nunc pro tunc* order, and hear evidence authorizing it, without notice having first been given. The court might, having the jurisdiction both of defendants and the subject matter, have entered the judgment on the first day of the October term. And so it might have entered the judgment at the December term, in spite of the rule setting that term apart for criminal business, though such a judgment would doubtless have been set aside upon the defendant's showing that, through surprise or for other reasons, it had operated to his prejudice. It might also have ordered immediate execution. This being so, it is difficult to see wherein appellant was prejudiced by the order entering the judgment as of the October term, especially as it is not pretended that he had any defense to the merits, and the fact of its rendition is shown by an entry in a record recognized by the statute (Ky. St., sec. 378), as part of the records of the court. The rule of court relied on was adopted by the court for the guidance of the clerk and as notice to litigants and counsel of what the court intended to do. If the court had power to make it, it had power to rescind it, and by entering the order did rescind it, if such entry was in violation of the terms of the

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Ahrens & Ott Manufacturing Company v. Hoehner.

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rule, or must be supposed to have acted on an emergency within the terms of the rule.

It is claimed that this was the correction of a clerical misprision, and under section 519 of the Code, must be done upon notice to the adverse party. Section 517 of the Code provides that certain enumerated things shall be deemed clerical misprisions, and there are others. It is conceded that the omission of a part of a judgment in entering it—the failure to allow interest or credits admitted, the allowance of too much interest, etc.—comes under this head; but we do not think the failure to enter a judgment directed by the court comes under this head, or requires notice to be given of a motion for its entry.

Wherefore, the judgment is affirmed.

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CASE 85—ACTION FOR MALICIOUS PROSECUTION—MAY 26.

**Ahrens & Ott Manufacturing Company v. Hoehner.**

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. **MALICIOUS PROSECUTION—INSTRUCTION ON MALICE.**—In an action for malicious prosecution it is error to define malice as “the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor.” In such an action there must be malice in fact or the motive must be improper or wrongful.
2. **SAME—PROBABLE CAUSE.**—The court may, in such an action, properly tell the jury that they may infer malice from a want of probable cause.
3. **SAME.**—What is probable cause is a question of law for the court but the facts from which the question of probable cause is determined are for the jury.
4. **SAME.**—Probable cause exists where the person instituting the prosecution believes and has such grounds as would induce a man of ordinary prudence to believe that the person against whom the prosecution is instituted has committed the offense.

106	692
114	759

106	692
114	556
136	482

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Ahrens & Ott Manufacturing Company v. Hoehner.

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5. **SAME—EVIDENCE.**—In an action for malicious prosecution the jury should be instructed that the plaintiff can not recover unless the prosecution was both malicious and without probable cause; and in determining the latter issue the court should permit the defendant to prove all statements made to its agents before the warrant was sworn out tending to connect the appellee with the offense.
6. **SAME—ADVICE OF COUNSEL.**—Advice of counsel only constitutes probable cause when reasonable diligence has been used to ascertain the facts upon which the advice of counsel was sought.

**RANDOLPH H. BLAIN, R. C. KINKEAD AND ZACH PHELPS FOR THE APPELLANT.**

1. On probable cause. 17 Ky. Law Rep., 1131; Shaul v. Brown, 4 Am. Rep., 158; Hilliard on Torts, vol. 1, p. 438; Myer v. L., St. L., E. R. R., 17 Ky. Law Rep., 947.
2. Advice of counsel. Crawford v. Kayser, 5 Ky. Law Rep., 593; Arnold v. Hicks, 5 Ky. Law Rep., 934; Burke v. Rhodes, 13 Ky. Law Rep., 431; 36 Am. St. Rep., 147; Johnson v. Miller, 58 Am. Rep., 231; Dunlap v. New Zealand, 109 Cal., 365; Smith v. Liverpool, 107 Cal., 432; Monaghan v. Cox, 31 Am. St. Rep., 555; Johns R. R. v. Hynt, 59 Vt., 294.
3. Malice not shown. Shaul v. Brown, 4 Am. Rep., 155; Emmerson v. Cochran, 111 Pa. St., 622; Madison Pa. R. R., 30 Am. St. Rep., 756.
4. Good faith. Sandell v. Sherman, 40 P., 493.

**KOHN, BAIRD & SPINDLE FOR APPELLEE. (O'NEIL & PRYOR OF COUNSEL.)**

1. Express malice was not necessary to be proved. Want of probable cause was shown from which the jury was authorized to infer malice.
2. It was not competent upon the issue of probable cause to show that Mr. Marschuetz communicated to the officers of the defendant company that he had heard that the plaintiff was attempting to steal the defendant's enameling process. This did not bring the case within the ruling in the case of Myer v. Railroad, 17 Ky. Law Rep., 945. See Central Railway Co. v. Brewer, 28 Atl. Rep., 16. The statement of Marschuetz did not tend furthermore in the slightest to show that any crime had been committed.

**JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

Appellee instituted this action against appellant to recover damages for an alleged malicious prosecution. The

jury having found for him \$5,000 damages, and the court having overruled appellant's motion for a new trial, it seeks by this appeal a reversal of the judgment against it for that amount.

The case arose in this way: Appellant is a corporation engaged in the business of manufacturing plumbers' supplies, such as bath tubs, lavatories, sinks, etc., in the city of Louisville. In this business it possessed a secret process of enameling, by which it is claimed it manufactured a very superior article of bath tubs and the like. It paid \$3,000 for the secret process, and expended quite a large sum in introducing and developing it. In February, 1895, it received information that appellee and two of its employes, Louis Link and Theodore Zeutsius, were engaged in a conspiracy, the object of which was to discover this secret process, and sell it to another firm. To prevent this secret from being known, appellant allowed nobody in its mixing room except Charles Ahrens, its inspector, Oscar Marschuetz, its superintendent, and Aloysius Massman, its enameler, unless in their presence, and by their orders. The door was kept locked, and the windows barred. When the materials were mixed in the mixing room, they were taken to the furnace, and, after passing through the furnace, could not be separated so that the secret process might be discovered by chemical analysis or otherwise. But before the mixture passed through the furnace, an expert, by analyzing it, if he had some of the mixture, could ascertain the ingredients and so discover the secret. The proof tends to show that it was Link's duty to oil the machinery in the mixing room when required, and that appellee, who was anxious to learn the secret process of enameling possessed by appellant, had in his possession some of the mixture which Link had

brought to him, and afterwards confessed to appellant that appellee had procured him to do this so that he might learn the secret. Letters written by appellee, strongly confirming this confession of Link's, were delivered by him to appellant. On this information, acting under the advice of its counsel, appellant had a warrant issued against all three of the men for burglary; Zeutsius being also implicated, and the door of the mixing room showing signs of having been forced open. Appellee was arrested when an express wagon was awaiting at the door to take his trunk to the station for the purpose of his leaving the State. The mixture referred to was in his trunk.

When the case came before the grand jury, they found an indictment against the three defendants for grand larceny, the change in the charge being perhaps due to the advice of the counsel for the prosecution. Link was tried on the indictment, and acquitted. It was then dismissed as to the other two defendants, and appellee then filed this suit. He was under arrest for perhaps an hour and a half before giving bond, but was not imprisoned. He testified on the trial that he knew the secret of appellant's process, and had known it for some time; that he was only trying to get from Link information where appellant bought its material; that the mixture he had did not come from appellant's factory, but was bought at a drug store by Link for 35 cents. In view of the fact that his testimony shows that the ingredients he had could be bought at any drug store, and the other facts in the record, his explanation as to what he and Link were after is very unsatisfactory, and from the letters and the other undisputed circumstances it is hard to escape the conclusion that the conspiracy existed as charged by appellant. Still, under the rule adopted in this State, there was some evidence tend-

ing to sustain appellee's version of the transaction, and the court properly refused to instruct the jury peremptorily to find for the defendant.

After telling the jury that appellant was not liable unless the prosecution was malicious, and without probable cause, the court thus defined malice:

"The court instructs the jury that by the terms 'maliciously' and 'malice,' as used in these instructions, is meant the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor." In Bishop on Noncontract Law, sec. 231, the learned author says that the meaning of the word "malice" depends largely upon the subject to which it is applied, and that in a general way its meaning is as above defined. He then adds: "In the law of malicious prosecution it requires the mental condition or purpose, which judicial decision has made an indispensable element in the wrong. It is not a mere fiction of law, but it must be malice in fact. Taking these views for our guide, the malice in malicious prosecutions is not necessarily, while it may be, ill will to the individual; but it is any evil or unlawful purpose, as distinguished from that of promoting the justice of the law."

The same rule is laid down in Cooley on Torts (1st Ed.), 185, where it is said that the motive must be improper or wrongful.

Tested by this rule, the instruction quoted should not have been given. The court properly told the jury that malice might be inferred by them from the want of probable cause; but this is an inference that the jury may or may not make. The existence of malice is a question for the jury on all the facts and circumstances of the case, and the jury, from the definition of malice given them, may have understood that they must regard the prosecution to be malicious in law if without justification or legal



excuse, although there was, in their judgment, no malice in fact.

The court properly defined probable cause, but he did not tell the jury what facts constituted probable cause, in this case. What facts constitute probable cause is a question of law for the court. *Lancaster v. Langston* 18 Ky. Law Rep., 299 [36 S. W., 521]; *Meyer v. L. & T. Railway Co.*, 17 Ky. Law Rep., 945 [33 S. W., 98]. The court should tell the jury what facts constitute probable cause, and let them determine, in a case like this, whether these facts are proved. *Anderson v. Columbia F. & T. Co.* [50 S. W., 40]. The court should have instructed the jury that there was probable cause in this case if appellant's agent, when he instituted the criminal proceeding, believed, and had such grounds as would induce a man of ordinary prudence to believe, that appellee had entered into a conspiracy with Link or Zeutsius to get illegally their secret process of enameling, and in furtherance of that design, either by himself or one of them, had forced open the door of appellant's mixing room, or taken therefrom some of its secret mixture, without its consent, for the purpose of appropriating it to his own use.

On another trial the court should give the jury the instruction asked to the effect that appellant was not liable, although appellee was in fact innocent, unless the prosecution was both malicious and without probable cause. In a case like this the party making the complaint is liable only for an abuse of the process of the court, and, unless their attention is called to it, a jury may fail to observe the distinction, and conclude that, if the party charged with crime was in fact innocent, he ought to recover. The court should also allow all statements made to appellant's officers or agents before the warrant was sworn out by either

Link or Zeutsius to be proven as well as any other information appellant had then, tending to connect appellee with the offense. Though this evidence may not show that he was guilty, it might serve to show that appellant was warranted in doing what he did, or was not actuated by malice.

The court properly instructed the jury that the advice of counsel would constitute probable cause only when reasonable diligence was used to learn the facts on which the advice of counsel was sought. We are referred to *Johnson v. Miller*, 69 Iowa, 562 [58 Am. R., 231, 29 N. W. 743]; *Dunlap v. New Zealand*, 109 Cal., 365 [42 Pac., 29], and several other cases, holding otherwise; but the instruction given by the court is sustained by the leading text writers. See *Bishop on Noncontract Law*, sec. 236; 3 *Lawson on Rights, Rem. & Prac.*, sec. 1096; 14 *Am. & Eng. Enc. Law*, 55, 56, and cases cited. It follows the rule heretofore announced in this State. *Burke v. Rhodes*, 13 Ky. Law Rep., 431; *Anderson v. Columbia Trust Co.*, [50 S. W., 40]. This is not only the weight of authority, but it seems to us the necessary result of legal principles. He who consults an attorney about a matter affecting a third person, ought to use that care which men of ordinary prudence would ordinarily use in matters of like magnitude. Less than this would not show good faith. Of course, it is absolutely necessary, in questions of this sort, that people should act upon the advice of counsel; but they must exercise, in doing so, reasonable care to get the truth before the counsel. On another trial the court should define reasonable diligence as that care which men of ordinary prudence would usually exercise under like circumstances.

Judgment reversed, and cause remanded for a new trial and further proceedings not inconsistent with this opinion.

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Breathitt Coal, Iron and Lumber Co., The, v. Strong, &c.

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CASE 86—EJECTMENT—MAY 26.

## Breathitt Coal, Iron and Lumber Co., The v. Strong, Etc.

APPEAL FROM BREATHITT CIRCUIT COURT.

**EJECTMENT—PATENTS—DEFINITENESS REQUIRED.**—Where the exterior lines of a patent boundary are sufficiently definite to locate the land, the patent is not invalidated by excluding unidentified tracts within the boundary held under prior grants.

**B. M. BURDETT, J. E. PATRICK, MAT. WALTON AND W. S. PRYOR**  
FOR APPELLANT.

Validity of patent. First, its regularity.

Second, not void for uncertainty of the description of boundaries. *Board v. Head*, 3 Dana, 490; *Taylor v. Com.*, 15 B. M., 18; *Camp v. Prather*, 7 B. M., 599; *Boardman v. Lessees of Reid and Ford, &c.*, U. S. Rep., No. 345, 2 vol., 502; *Am. & Eng. Ency. of Law*, vol. 5, p. 423; *Ballards Real Estate*, sec. 95.

Third, as to exclusions not specifically described. *Drake v. Ramsey*, *Hardin's Rep.*, 34; *Craig v. Cogar*, *Hardin's Rep.*, 384; *Overton and Reid v. Robert*, 4 Bibb, 156; 1 Bibb, 60; *Hamilton v. Fugett*, 81 Ky., 367; *Hall v. Martin*, 89 Ky., 9; *Ballowe v. Hillman*, 18 Ky. Law Rep., 677; *Register v. Reid*, 9 B., 103.

**W. S. PRYOR IN A SEPARATE BRIEF FOR THE APPELLANT.**

The demurrer to the petition should have been overruled. There is nothing in the petition to indicate any uncertainty or want of description in the boundary of land sued for. The case of *Hamilton v. Fugett*, 81 Ky., 367, is of questionable authority, and if it is to be deemed in point, was overruled by the case of *Hall v. Martin*, 89 Ky., 9.

**MARCUM & POLLARD FOR THE APPELLEES.**

1. The exterior boundary described in the petition is indefinite, uncertain and the lines too sweeping, and because the exclusions to be made are indefinite and uncertain. *Hamilton v. Fugett*, 81 Ky., 367; *Hillman v. Hurley*, 82 Ky., 630; *Craig v. Williams*, 82 Ky., 161; *Roberts v. Davidson*, 83 Ky., 280.
2. The statute in force at the date of the survey and issual of this patent did not authorize the issual of the county court order or the taking of a survey or granting a patent plat for less than

Breathitt Coal, Iron and Lumber Co., The, v. Strong, &c.

25 nor more than 200 acres. Register v. Reid, 9 Bush, 106; Revised Stats., ch. 102, sec. 3.

SAME COUNSEL FOR THE APPELLEE IN A PETITION FOR A REHEARING.

PATRICK, WALTON, PRYOR AND BURDETT FOR APPELLANTS IN RESPONSE TO A PETITION FOR A REHEARING.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

This appeal calls in question the validity of a patent issued by the Commonwealth of Kentucky to Stephen G. Reid on June 15, 1872, for one hundred and fifty-four thousand eight hundred acres of land, which excluded twenty-five thousand acres "of patented and otherwise appropriated land, which is deducted from the calculation." The courses and distances are given in describing the outer boundary of the patent, most of the lines of which call for the meanders of streams of water. The others call for rocks and trees and the dividing lines of certain counties. The lines are so designated by the calls of the deed that any person familiar with the country where the patent is located could follow most of them without a compass, and a surveyor would have but little trouble in locating the lines designated by other calls in the patent. So it seems to us there is no uncertainty in the lines describing the boundary of land so as to even suggest the patent is invalid by reason of any uncertainty in the description of the land embraced in the patent. The only question which merits consideration is whether the patent is void by reason of its failure to describe the *excluded* boundaries. In 1805, in the case of Drake v. Ramsey & Logan, Hardin, 34, and in 1808, in Craig v. Cogar, Hardin, 386, this court held that patents containing exclusions without defining the boundaries of the land thus excluded were valid. The question again arose in 1815 in Overton & Reed v. Roberts, 4 Bibb, 156, where this court said: "It

is also objected that the entry under which the appellee derives claim, in calling for the exclusion of prior entries, is vague and invalid upon its face.

"Whatever doubts might exist as to the validity of this entry, were the objection now taken of the first impression, since the repeated decisions of this court sustain entries with like calls, it can not now be permitted to prevail.—See *Hardin*, 34, 384—1 *Bibb*, 60.

"With respect to land claims, the interest of the community certainly requires in an eminent degree uniformity of decisions; and this court, acting in obedience to that interest, as well as from a due respect to their former adjudications in the consideration of analogous cases, should yield to their influence."

There seems to have been no change in the opinion of this court with reference to such patents, unless it can be said to have occurred in 1881, when the opinion was delivered in *Hamilton v. Fugett, &c.*, 81 Ky., 366, where it is claimed a contrary doctrine is announced. However, this court, in *Hall v. Martin*, 89 Ky., 9 [11 S. W., 953], construed the opinion in *Hamilton v. Fugett* as not meaning to hold that a patent would be void because of its failure to describe the boundaries excluded. In *Hall v. Martin* the court reannounced its early doctrine upon this question, and held that a patent is not void merely because it excluded prior grants without identifying or describing them, and that where a patent is indefinite, both as to the exterior boundary and to the exclusions, it is void for uncertainty. It was held in *Ballowe, &c., v. Hillman, &c.*, 18 Ky. Law Rep., 677 [37 S. W., 950], that a patent for seventy-five thousand acres of land, giving the outer boundary, and then excluding "all those surveys of land to which there is now a lawful title," without designating the boun-

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Bright, &c., v. First National Bank, &c.

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daries excluded, is not void for uncertainty, but passed the title to all the vacant and unappropriated land in the boundary called for by the patent.

It is unnecessary to go into a discussion of the question as to whether the doctrine announced by this court on this question almost a century ago is correct. It is sufficient to say that this court, in *Hall v. Martin*, and in *Ballowe v. Hillman* reaffirmed it with elaboration, and it must be accepted as the settled doctrine of this court. On such an important question as is here involved, the opinion of the court should be so certain in its meaning that the legal profession will not be in doubt as to what is the settled doctrine; hence we have said that the early cases of the court and those of *Hall v. Martin* and *Ballowe v. Hillman* enunciate the settled doctrine of the court.

The court erred in sustaining a demurrer to the petition.

The judgment is reversed for proceedings consistent with this opinion.

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CASE 87—ACTION ON PROMISSORY NOTE—MAY 27.

Bright, Etc. v. First National Bank, Etc.

APPEAL FROM GRAVES CIRCUIT COURT.

PRACTICE—AMENDED PETITION—CONSIDERING ALL PLEADINGS ON DEMURRER.—After a special plea of *non est factum* has been interposed to a renewal note by parties who deny having received any of the proceeds of the note and who aver that their names have been signed by the principal without written authority, the plaintiff may by an amended petition declare on the original note and to such amended petition a general plea of payment will not be good. On a demurrer to such plea the court will examine the entire pleadings and will infer that the defendant intended that the old note was paid by the renewal.

## ROBBINS &amp; THOMAS FOR THE APPELLANTS.

1. A valid note pays a debt or note for which it is given. Letcher v. Bank, 1 Dana, 82; Castleman v. Holmes, 4 J. J. Mar., 3.
2. Suit can only be brought on last valid renewal note. Bank v. Gaines, 87 Ky., 597.

## WEBB &amp; COULTER FOR THE APPELLEE.

A party who sues on a renewal note to which the defendants plead *non est factum*, may by an amended petition set out the execution of the original note and recover upon it. Stratton v. McMakin, 84 Ky., 641; Bank v. Gaines, 87 Ky., 597; Bank v. Cash, &c., 44 S. W. R., 381.

## JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

Appellee instituted this action in the Graves circuit court against W. J., V. E., C. A., and B. F. Bright to recover judgment upon a note for \$574.20 of date March 28, 1896, due in four months, credited by \$30 paid July 31, 1896.

The defendants, V. E., C. A., and B. F. Bright, by answer, denied that they ever signed or delivered the note sued on, or ever promised to pay \$574.20, or any part thereof. In the second paragraph of the answer it is alleged, in substance, that the note sued on was given by defendant W. J. Bright for money which it loaned to him, and these defendants never received any part of the money loaned on said note, and their names were signed to said note as sureties by W. J. Bright for him, but the said W. J. Bright never had any authority in writing from either of them to sign the name of either of said defendants as surety on said note.

To this appellant replied, denying that the said answering defendants never received any part of the money loaned on the note, denies that their names were signed to said notes as sureties by W. J. Bright, or that he did not have written authority to sign their names. In the second paragraph of the reply it is alleged that the

note sued on is one of several renewals of a debt created September 26, 1894, for \$500, for which all of the defendants executed, signed, and delivered to plaintiff their joint note, which is herewith filed. Plaintiff says that this original note was signed by all these defendants in person, and in their own handwriting, and, if their names were signed to this last note as they allege, it was without plaintiff's knowledge or consent, and is invalid, and they are entitled to recover on said original obligation.

This reply was filed November 30, 1896, and on the 8th of December, 1896, the appellant filed an amended petition, over the objection of these defendants, upon which summons was issued and executed. The substance of the amended petition is that the appellee nor any of its officers were present when the note sued on was signed, and it does not know whether it was signed by C. A., V. E., and B. F. Bright in person or not, but it avers that it was signed both in person and in their own handwriting; that the note was one of several renewals of a debt of date September 26, 1894, for the sum of \$500, for which defendants executed to plaintiff their joint note for said sum, due six months after date, and it says and charges that all of the defendants signed said note in person, and same is their handwriting; and that the note filed with plaintiff's petition was a renewal of said debt, with accumulated interest. Plaintiff says that, if said renewal was signed as claimed by defendants in their answer, it was without plaintiff's knowledge or consent, and same is invalid, and in that event they are entitled to recover on said original obligation. Said original note is herewith filed. Wherefore it prays to file this amended petition, and that they be permitted to recover on said original note if defendants did not sign said renewal, and prays for all proper relief.



The answer of the defendants to the amended petition reads as follows: "The defendants herein, by way of answer to the amended petition filed December 8, 1896, and rejoining to the reply filed November 30, 1896, say that the note for \$500 declared on in the amended petition and in the reply, and filed with said reply, was paid March 26, 1895, to plaintiff, together with all interest thereon, and they deny that plaintiff is entitled to recover anything thereon. Wherefore they pray to be dismissed," etc.

To this answer the plaintiff filed a demurrer, and on motion of defendants plaintiff's general demurrer to the answer of defendants to the amended petition of plaintiff was asked to be carried back to said amended petition; and the court being advised, overruled said demurrer to the amended petition, to which the defendants excepted; and the court, being advised, sustained said demurrer to said answer, to which defendants excepted, and the defendants failing to plead further, judgment was rendered against all of them for the amount claimed in the amended petition. To which all the defendants, except W. J. Bright, excepted, and have appealed to this court.

It is the contention of the appellant that the court erred in sustaining the demurrer to the answer, and they insist that a plea of payment is always a good defense to a suit upon a note. As a general proposition of law it may be conceded that a demurrer can not be sustained to an answer pleading payment; but, taking the entire pleadings into consideration in this case, it is manifest that the plea of payment, in effect, presents the question whether the execution of a note or notes by the same parties subsequent to the execution of the note set up in the amended petition constituted a payment of such note, being merely a renewal of the obligation incurred by the execution of the

note mentioned in the amended petition; and, this being true, we think the demurrer was properly sustained, for the reason that a renewal by the principal in the note with the same parties as apparent sureties, though not legally bound as such, does not and can not operate as a payment of the original debt.

We can not concur in the contention of appellants that the amended petition was defective because it did not clearly admit that the note first sued on was invalid as to the appellants; but the amended petition is an alternative pleading, which is allowed by the Code of Practice. Nor do we think that the appellee was bound to sue upon the last valid renewal of the obligation named in the amended petition. We are unable to see how appellants could be prejudiced by the plaintiff relying upon the first obligation executed, if he was entitled to rely upon any obligation, except the note first sued on.

We think the proceedings taken by the appellee in this case and the judgment rendered are fully sustained by former decisions of this court. See *Stratton v. McMakin*, 84 Ky., 641 [4 Am. St. R., 215]; *First National Bank of Covington v. Gaines*, 87 Ky., 597 [9 S. W., 396]; 7 Bush, 243; 5 Bush, 392; 2 Bush, 72 [92 Am. Dec., 475].

Judgment affirmed, with damages.

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CASE 88—ACTION ON BILL OF EXCHANGE—MAY 31.

### Lyddane v. Owensboro Banking Co.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. **BILLS AND NOTES—PLEADING—PETITION.**—In an action by an indorsee on a bill of exchange it is not necessary to allege specifically that the indorsement was to the plaintiff. A promise by

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Lyddane v. Owensboro Banking Co.

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the acceptor to pay an indorsement by the payee and that the plaintiff is the owner and holder thereof is sufficient because such averments import a promise by the indorser to pay.

2. **SAME—NOTICE OF DISHONOR—EFFECT OF KENTUCKY STATUTES, SECTION 3725.**—Failure of the holder of a bill of exchange to cause notice of dishonor to be given to a prior indorser does not release a subsequent one to whom such notice was given. Section 3725, Kentucky Statutes, did not operate to repeal the common law in this regard, but merely to change the method of giving notice required by the law-merchant.

**WALKER & SLACK FOR THE APPELLANT.**

1. The demurrer to the petition should have been sustained as there was no averment in the petition of any agreement on the part of the appellant to pay. *Huffaker v. National Bank of Monticello*, 12 Bush, 287; 1st Chitty Pld., 301-2; Same, 363; vol. 2, p. 383.
2. The demurrer should not have been sustained to the answer. The bill was placed upon the footing of a foreign bill of exchange. Acts 1885-6, vol. 2, ch. 864, sec. 6. The Kentucky Statutes, sec. 3725, imposed upon notaries the duty of giving the notice of dishonor to the drawer and endorser, and his failure to notify the drawer or any endorser released all the subsequent parties on the bill. *Sebree Dep. Bk. v. Moreland*, 95 Ky., 150; s. c., 28 S. W. R., 153; 3 Randolph on Com. Paper, secs. 1235, 1237; 2 Daniel on Neg. Instr. (4th ed.), secs. 970, 971, 995, 1303; 2 Am. & Eng. Ency. of Law, 386, 387, 408, 388; *Wheeler v. Samuels*, 9 Heisk, 393; 29 W. Va., 548; *Todd v. Edwards*, 7 Bush, 89; *Mulholland v. Samuels*, 8 Bush, 63; *Neal v. Taylor*, 9 Bush, 380; 24 Am. & Eng. Ency. of Law, 845; *Edwards v. Dick*, 4 B. & A. L. D., 212; *Bank v. Floyd*, 4 Met., 145; *Story on Bills*, sec. 245.

**BIRKHEAD & CLEMENTS FOR THE APPELLEE.**

Section 3725 of the Kentucky Statutes did not change the law-merchant as to the necessity of giving notice of dishonor of a bill but merely changed the method by which the notice was to be given. Ky. Stats., sec. 3725; *Todd v. Edwards*, 7 Bush, 89; *Neal v. Taylor*, 9 Bush, 380; *Daniels Neg. Instr.*, sec. 987; *Tiedeman on Com. Paper*, sec. 336; 2 Am. & Eng. Ency. of Law, 412; *Meyers v. Standart*, 11 Ohio, —; *Matthews v. Fogg*, 44 Am. Dec., 257; *Union Bank v. Lea*, 44 Am. Dec., 275; *Union Bank v. Hyde*, 44 Am. Dec., 290; *Randolph, Com. Paper*, sec. 1238.

**JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.**

Appellee bank brought suit on a bill of exchange drawn by Clark on Boyd, accepted by Boyd, payable to the order

of Slack and appellant Lyddane, indorsed by payees, and purchased and discounted by the bank.

A demurrer to the petition was properly overruled, it being alleged that the payees indorsed the bill by writing their names across the back, and that the plaintiff was the owner and holder thereof. It is unnecessary to allege, in addition, that the indorsement was to plaintiff. *Osborne v. Stevens*, 15 Wash., 478 [46 Pac., 1027]; 14 Enc. Pl. & Prac., 524. A promise by the acceptor to pay is alleged, and that appellant indorsed the bill to the bank, or the equivalent of that allegation. It is a sufficient averment. In the case of *Huffaker v. Bank*, 12 Bush, 287, no promise at all was alleged. But in this case the averment is that the acceptor promised to pay, and, in substance, that appellant indorsed the bill to appellee, which is sufficient to make appellant liable. A promise by the acceptor to pay being alleged, a proper averment of an indorsement by payee to plaintiff is equivalent to an averment of a promise to pay by the indorser, for it is an averment of facts which, under the law-merchant, make the indorser liable.

The answer of appellant pleads that he is a mere accommodation indorser, and had no interest in the proceeds of the bill; that neither the notary who protested nor appellee gave the prior indorser, Slack, any notice of non-payment, dishonor, or protest; that Slack was thereby released, and his release operated to release Lyddane, the failure to give Slack notice being without Lyddane's knowledge or consent. A demurrer to this answer was sustained.

Appellant claims that the answer was sufficient, upon the ground that the law merchant is changed by the statute (Ky. St., sec. 3725) providing that:

"It shall hereafter be the duty of notaries public, upon

protesting any of the instruments mentioned in section three thousand seven hundred and twenty-three, to give or send notice of the dishonor of such paper to such of the parties thereto as are required by law to be notified, to fix their liability on such paper; and when the residence of the parties is unknown to the notaries public he shall send the notices to the holders of such paper, and he shall state in his protest the names of the parties to whom he sent or gave such notices, and the time and the manner of giving the same, and such statement in such protest shall be *prima facie* evidence that such notices were sent or given as therein stated by such notary."

It is contended that this statute requires the notary to give notices to all the parties who can be found thereby, and not merely those who are by the holder desired to be held; that the liability of indorser is that of surety, and that he is released by the discharge in any manner of a prior indorser, who, as to him, holds the relation of a principal. It is earnestly insisted that though, at common law, the holder of a dishonored bill was required to notify the last indorser only, if he desired to hold such indorser alone, the common law was in this behalf abrogated by the statute. The notary was required to give notice to every one who could be held, to give such notice as the agent of the holder, and the holder was therefore bound by the notary's default in notifying any prior indorser, and, if such prior indorser was released by failure to give notice, that released the last indorser. Such is not the true intent of the statute. It is made the duty of the notary to notify those whom the holder desired to hold bound. Granting that in the discharge of this duty the officer acted as agent of the holder, the holder's responsibility for the action of his agent was not made greater than at common law it was for his own acts.

Counsel for appellant, with commendable candor, quote as follows from 2 Daniel on Negotiable Instruments, sec. 1303:

"But though all the parties to such a bill are sureties of the acceptor, they are not, as between themselves, co-sureties, liable for contribution to each other in the event that any one should pay the amount for the acceptor; but each prior party is a principal as between himself and each subsequent party."

From this it follows that Lyddane was not, by the law merchant, a surety as to the bank, but was a principal. His relation in this behalf is not changed by the statute.

In *Todd v. Edwards*, 7 Bush, 89, a case arising under a statute identical with the existing statute, the court, through Judge Peters, said:

"But if a bill be drawn for the accommodation of the drawer or acceptor, and indorsed by the payee and subsequent indorsers, if the holder intends to hold any or all of said indorsers responsible to him, as many as he intends to make responsible are entitled to notice of the dishonor of the paper, because the indorser who pays it has a right to hold the prior parties on the bill responsible to him; and he should be notified, so that he may take the necessary steps to secure himself."

The law-merchant was not, in our opinion, abrogated by the statute, except in so far as a change was made as to the method of giving a notice of protest.

The judgment is affirmed, with damages.

CASE 89—ACTION ON NOTE. COUNTER-CLAIM FOR RESCISSION—JUNE 1.

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## Worland v. Secrest.

APPEAL FROM NICHOLAS CIRCUIT COURT.

**RESCISSION—BREACH OF WARRANTY.**—A written contract is presumed to embrace the entire agreement between the parties and in the absence of proof of fraud committed by one of the parties before or at the time of the execution of the contract, the other party is not entitled to (1) a rescission on that ground, or (2) to damages for breach of warranty.

**W. H. HOLT FOR APPELLANT. (W. R. ROSS AND SON OF COUNSEL.)**

1. The action should not have been transferred to equity. Kerr on Fraud and Mistake (Bump's ed.), p. 328.
2. No fraud was proved.

**KENNEDY & WILLIAMSON FOR APPELLEE.**

1. The defendant was entitled under the facts and circumstances of this case to have it transferred to the equity side of the docket. Brooks v. Carneal's Admr., Litt. Selec. Cases, 164; Cummins v. Latham, T. B. M., vol. 4, p. 103; 9 Am. & Eng. Ency. of Law, 676, 677; 8 Am. & Eng. Ency. of Law (1st ed.), 651; Prewitt v. Trimble, 92 Ky., 176.
2. The defendant offered to rescind the contract in a reasonable time after discovering fraud. Gately v. Newell, 9 Ind., 572; Neblett v. MacFarland, 92 U. S., 105.
3. The testimony in this case shows conclusively that a gross fraud was practiced upon the appellee by the vendor in the sale of the patent purchased.

**JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

R. H. & C. G. Moreman owned a patent cistern cleaner and water purifier which cleaned cisterns without taking the water out, and purified the water by means of a cylinder filled with air, let down to the bottom of the cistern, the pressure of the water when a valve was opened in the bottom of the cylinder scouring the bottom of the cistern, and forcing the mud up into the cylinder as the air escaped.

R. H. Moreman, going about using his cleaner and selling the right, stopped with appellee, George R. Secrest, a hotel keeper at Carlisle, Kentucky, and while there had several talks with him about the value of his patent, and what the cleaner would do. Secrest proposed to buy the right for the State of Illinois, and after Moreman left Carlisle, for Richmond, Kentucky, Secrest went to Richmond, and there they made the following written contract:

"Article of agreement between R. H. & C. G. Moreman, of the county of Meade and State of Kentucky, party of the first part, and George R. Secrest, of the county of Nicholas and State of Kentucky, of the second part, witnesseth that, for and in consideration of the sum of one dollar cash in hand paid, the receipt whereof is hereby acknowledged, and for the further consideration of five hundred dollars (less 20 per cent.), do hereby agree to convey to the party of the second part their right, title, and interest in and to the State of Illinois in their patent cistern cleaner and water purifier, known as 'Moreman's Cistern Cleaner.'

"The party of the second part hereby agrees to pay to the party of the first part the five hundred dollars aforementioned (less 20 per cent.), when said party of the first part shall have made to said second party a deed of patent in full.

"The party of the first part further agrees to grant to the party of the second part an option on the States of Indiana, Ohio, and Iowa for a period of eight months from this date, and it is further agreed between said parties that the party of the second part may sell to whom he pleases the aforementioned States, receiving from the said first party 20 per cent. on all sales made of said territory, but that the sale of no State shall be under five hundred dol-



lars. Witness our hands, this 25th day of September, 1894. R. H. & C. G. Moreman, by R. H. Moreman. George R. Secrest. Witness: J. S. Kennedy."

It appears from the evidence that Moreman used the machine very successfully, cleaning out quite a number of cisterns, and created considerable interest in his invention at Carlisle and in the vicinity. It also appears that he sold county rights to other parties, and they did some work which was then thought very successful. On January 17th, following, Moreman duly conveyed by deed the patent right for the State of Illinois to Secrest, who paid him \$150 cash, and executed to him his note for \$250, due in four months. The deed and note are in the usual form. Secrest failed to pay the note at maturity, and when sued upon it by appellant, to whom it had been assigned, alleged that as an inducement for him to make the purchase of the patent right Moreman represented to him that he was the inventor of a new and useful invention for cleaning wells and cisterns, which would clean all wells and cisterns perfectly and purify the water; that there was no other patent in existence covering the same ground that his invention covered, or that would do what his invention would do; that he relied upon these representations, and was induced by them to make the trade; but he alleged that they were all false and fraudulent, and were known by Moreman to be false and fraudulent at the time, and that they were made for the fraudulent purpose of inducing him to make the purchase. He also alleged that there was another patent covering substantially the same ground, which was better than Moreman's, and that his patent was worthless. He prayed a cancellation of the deed and note, and judgment for the amount that he had paid.

Issue being joined, and the case transferred to equity, the court below on final hearing dismissed both the petition and counter-claim. This was, in effect, a finding by the court below that there was no fraud in the transaction; for, if the charges of fraud had been deemed maintained, the deed should have been canceled, and the consideration paid should have been restored to appellee. The evidence very clearly sustains this conclusion. It shows that there is another patent, somewhat similar to Moreman's, which cleans the cistern very well, but does not aerate or purify the water, as it is claimed Moreman's invention does. So this patent does not cover the same ground as Moreman's. It had only been obtained a short time before, and its existence was unknown to him. The proof as to Moreman's representations of what his cleaner would do does not show that he said anything more than he was justified in believing from his experience. The testimony is persuasive that appellee's purchase was induced more by what the cleaner did and the interest created in the community than by Moreman's statements. We think it, therefore, clear that the transaction can not be set aside for fraud.

The court below evidently reached this conclusion; but the evidence showing that the other patent did better work than Moreman's, and that his was not valuable, the chancellor was of opinion that Moreman's representations, which, under the rule in this State, are regarded as warranties, had not been made good, and so the patent right was worth much less than was supposed. He therefore made an abatement of the price as for a breach of warranty in the sale. The question therefore arises, admitting that the evidence would sustain the conclusion of the chancellor, can the court allow an abatement of the price for a

breach of verbal representations made at the time of the sale, where the parties have put their contract in writing, and there is no fraud in the transaction?

It is a well-settled rule that where parties have deliberately put their contract in writing it is conclusively presumed that their whole engagement was reduced to writing, unless from the form of the instrument this does not appear to have been the intention of the parties. Parol evidence of previous or contemporaneous negotiation will not be admitted to vary the terms of the written agreement, in the absence of fraud or mistake, for the previous, verbal negotiations are merged in the writing. The written contract in this case, above quoted, and the formal deed which was afterwards made, must be presumed to have been intended by the parties to embrace the contract between them, and, as neither of these contains a warranty, none can be implied, and proof of verbal representations previously made not amounting to fraud can not be received.

In a note to *Hobart v. Young*, 12 Lawy. Rep. Ann. 694 (s. c. 21 Atl. 612), the learned editor says, citing many authorities:

"If the article is sold by a formal written contract, or a regular bill of sale, and that is silent on the subject of warranty, no oral warranty made at the same time, or previously even, can be shown, since the writing is supposed to embody the whole contract. For the same reason no additional oral warranty can be ingrafted on or added to one that is written."

This rule has received the indorsement of the Supreme Court of the United States in *De Witt v. Berry*, 134 U. S., 306 [10 Sup. Ct., 536], and *Seitz v. Brewers' Refrigerating Machine Co.*, 141 U. S., 510 [12 Sup. Ct., 46]; the lat-

ter case being not unlike this. In *Reed v. Van Ostrand*, 1 Wend. 424 [19 Am. Dec., 529], the facts were substantially the same as in this case, and it was held that the purchaser was without remedy. See, also, 28 Am. & Eng. Enc. Law, 794, and cases cited.

There was no plea of mistake in the written contract, and, as the charge of fraud was not sustained by the proof, the court was not warranted in allowing an abatement of the price, because the patent right was less valuable than supposed by the parties when the trade was made. The judgment is therefore reversed, and cause remanded for judgment for plaintiff for the amount of the note.

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CASE 90—ACTION AGAINST COMMONWEALTH—JUNE 1.

Commonwealth v. Haly, Etc.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. **CONSTITUTIONAL LAW—SPECIAL RESOLUTION AUTHORIZING SUIT AGAINST THE COMMONWEALTH.**—A joint resolution authorizing named persons to sue the Commonwealth on certain claims in the Franklin Circuit Court is not a violation either of (1) section 231 of the Constitution, or (2) section 59 inhibiting special legislation where a general law can be made applicable. Such a resolution is not a "law" within the meaning of either section.
2. **LIMITATION—IN FAVOR OF COMMONWEALTH.**—Limitation does not begin to run in favor of the Commonwealth until permission has been granted to maintain a suit against it.
3. **TREASURY—GENERAL EXPENDITURE FUND.**—A judgment against the Commonwealth is payable out of the general expenditure fund where the military fund for a given year out of which the claim was originally payable has been exhausted.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER  
FOR APPELLANT.

The Legislature by joint resolution may not authorize an individual to sue the Commonwealth upon a specific claim. Such

## Commonwealth v. Haly, &amp;c.

a resolution is prohibited by the Constitution. Secs. 46, 51, 55, 230, 231 of Ky. Con.; Cooley on Con. Lim., pp. 65, 94; Sutherland on Stat. Con., secs. 30, 66, 79; May v. Rice, 91 Ind., 546; Galbreath v. Kuykendall, 1 Ark., 50; Estill v. Bailey, Id., 131; Woolford v. Dugan, 2 Id., 131; Ferris v. Crow, 5 Gilman, 96; Leighton v. Hall, 31 Ill., 108; Hutchins v. Edson, 1 N. H., 139; Little v. Little, 5 Mo., 229; 1 Black., 86; Ky. Stats., sec. 2704; Moore v. Maryland, 28 Am. Rep., 483.

## IRA AND W. H. JULIAN FOR APPELLEE.

1. Appellees were duly authorized to institute this suit. Joint Resolution of Gen'l. Assem. of Ky., approved March 15, 1898; Michigan St. Bk. v. Hastings, 41 Am. Dec., 552.
2. The State's immunity from suit is a personal privilege which it may waive at pleasure. Clarke v. Bernard, 108 U. S., 447; Cohens v. Virginia, 6 Wheaton, 100.
3. By the Constitution of the United States and the rules of the two Houses, no absolute distinction is made between bills and joint resolutions. Barclay Digest; Webster's Unabridged Dictionary, word "joint."
4. The cause of action herein is against the State, and is based upon express contract, and limitation against the same did not begin to run until adoption of said joint resolution in 1898.
5. This court will not reverse for error not specified in the motion and grounds for a new trial. McLain v. Dibble, 13 Bush, 297; Slater v. Sherman, 5 Bush, 206; Com. v. Williams, 14 Bush, 297; Jones v. Woche, 90 Ky., 230.
6. The jurisdiction of the court of the person of the Commonwealth was waived by failure to object thereto as provided by the Code. Civil Code, sec. 92.
7. The judgment below will not be reversed or modified, except for error to the prejudice of the substantial rights of appellants. Civil Code, sec. 756.
8. Representation of the Commonwealth by the Attorney-General. Ky. Stats., sec. 113.

## CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Upon the requisition of the quartermaster of the 2d regiment of the Kentucky State guard, appellees, who are merchants and supply people, furnished the State encampment with sundry and divers articles of food, camp furniture, etc., during the encampment, held pursuant to law, near Frankfort, in August and September, 1891.

For some reason not apparent in the record, these claims were not paid, although approved by the proper military authorities. Finally, in 1898, a joint resolution of the General Assembly was in due form adopted and approved by the governor, authorizing appellees to institute suit on their claims against the Commonwealth in the Franklin Circuit Court. In the suit brought under this authority, the justness of the claims was fully established, and the articles as ordered by the quartermaster were shown to have been necessary for the use of the encampment. Judgments were accordingly rendered for the amount of the various demands sued on, without interest.

The learned Attorney-General interposed in the lower court, and urges here, certain provisions of the Constitution as precluding a recovery on these demands. Section 231 of that instrument provides as follows: "The General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." And it is contended that the joint resolution on which appellees base their right to sue is not a direction *by law*, within the meaning of the section quoted. We are not disposed to controvert this proposition. A joint resolution may not be "a law," within the meaning of the section. But we do not understand that the Legislature, in consenting to subject the Commonwealth to the jurisdiction of her courts in the matter at hand, was attempting to enact a law in conformity with the provisions of section 231. That such a law might be enacted general in its terms, and applicable to every controversy between the sovereign and the subject, may be conceded. We understand such a law does exist in some of the States. But the General Assembly of this State has never exercised its right to pass such a law. Although clothed by express

constitutional authority to do so, it has persistently declined to exercise the authority, and enact such a law. This provision is not a new one to our organic law. It is found in our first Constitution adopted in 1792, and has been in each of the Constitutions since then. In speaking of this section, it was said by this court, in 1828 (Divine v. Harvie, 7 T. B. Mon. 440): "Although the Constitution has declared that 'the General Assembly shall direct, by law, in what manner and in what courts suits may be brought against the Commonwealth,' yet that body has never complied with this direction, but has hitherto kept in its own power the granting of justice to creditors of the State on petition. This voluntary grant of the State to individuals is the only judgment and execution to which the State is subject."

While therefore the voluntary grant to these appellees by joint resolution is not an attempted compliance with the provisions of section 231, and is not therefore a law, within the meaning of that section, it is nevertheless an effective consent of the sovereign to subject itself to the jurisdiction of the Franklin circuit court in the particular matter involved, unless, indeed, this consent is prohibited by section 59 of the Constitution, which provides that the General Assembly shall not pass local or special acts (paragraph 29) in any case "when a general law can be made applicable."

If this prohibition applies to the state of case at hand, then, before individual wrongs may be righted or supposed just demands be put to legal test in the courts, the Legislature must reverse the policy of a century, and enact a general law giving to all alleged creditors authority to sue the State.

The only question, at last, is, how may the creditor ob-

tain the consent of the State to be sued? The suggestion is not to be tolerated that he is without remedy. Surely he may petition his sovereign as in former times the subject might petition his prince. So the question is, shall the State enact a general law, through which "unnumbered woes may come," or, choosing the lesser evil, shall it continue to keep "in its own power the granting of justice to its creditors?"

We do not believe that this joint resolution, although confessedly special, in that it is for the sole benefit of certain individuals, can be regarded as covering a case where a general law can be made applicable, within the meaning and spirit of the Constitution. There is certainly no constitutional or statutory inhibition of suit against the State, and there is not a term of the Franklin circuit court at which the State at the will of its officials does not submit its rights to the jurisdiction of that court either as plaintiff or defendant. It may, and does often, intervene in suits pending in the various courts of the State. We can not believe that the action of the General Assembly, as expressed in the resolution, is to be held less effective in subjecting the State to the jurisdiction of its courts than the action of these State officials in the various suits in which it often appears at their instance as a litigant. Its immunity from suit is a mere personal privilege, and it may waive it by the action of its Legislature. It may certainly pay a just demand, and it may as certainly refer the question to the courts. As the State was not suable until it adopted the resolution in question, the plea of limitation can not defeat recovery. It is proper to say that, as the military fund for the year in which the encampment in question was held has been exhausted, the payment of the judgment obtained is of necessity to be



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Gatewood v. Long, &c.

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made out of the general funds in the treasury not otherwise appropriated.

The judgment is affirmed.

JUDGES DURELLE AND GUFFY DISSENTING.

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CASE 91—ACTION TO FORECLOSE MORTGAGE—JUNE 1.

### Gatewood v. Long, Etc.

APPEAL FROM BARREN CIRCUIT COURT.

*Res Adjudicata*.—A personal judgment for the amount of the note secured by mortgage in an action to foreclose a mortgage lien is a bar to a subsequent action for a sale of the property to enforce the collection of the judgment.

D. R. CARR FOR THE APPELLANT.

1. An assignment of the judgment by Gatewood to Lawless carried with it an assignment of the lien to secure the judgment. 6 B. M., 72; 8 B. M., 466.
2. In order to constitute a bar to a prosecution of a suit there must be an accord as to the whole cause of action for valuable consideration actually received from the defendant. *Wriston v. Lacy*, 7 J. J. Mar., 220; *Lewis v. Outton's Admr.*, 3 B. M., 455; *Donnelly v. Pepper*, 91 Ky., 363.
3. The court erred in sustaining appellant's exceptions to the deposition of Mrs. Jennie Gatewood for alleged want of notice—the depositions showing that defendants were present, cross-examining the witnesses.

WM. H. HOLT ON THE SAME SIDE.

1. There is no evidence to support the claim that the original judgment was a consent judgment.
2. The lien was not determined by the original judgment.
3. An assignment of the judgment carries the lien. *Roberts v. Bruce*, 91 Ky., 379.

W. L. PORTER AND GEORGE T. DUFF FOR APPELLEES.

1. It is apparent, although not clearly shown, that the original judgment was a compromise and settlement of the matters between the parties.
2. The judgment rendered against Ed. Long was a merger of the

## Gatewood v. Long, &amp;c.

note upon which the judgment was rendered; and the judgment rendered in that case ended the controversy.

## JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Ed. Long and his wife, Fanny Long, on December 30, 1885, executed to J. S. Gatewood their note for \$300, and a mortgage on a tract of land belonging to the wife to secure its payment. On February 2, 1888, Gatewood filed his petition in equity against Ed. Long and his two infant children (his wife being dead), seeking judgment upon the note, and a foreclosure of the mortgage on the land. Long filed answer pleading a failure of consideration. To this answer the plaintiff filed a reply, and by consent the allegations of the reply were taken as controverted. Some proof was taken by the parties, and on September 25, 1889, the action was submitted for trial and judgment. On October 12, 1889, the following judgment was entered:

"The court being fully advised, it is adjudged by the court that the plaintiff, J. S. Gatewood, recover of the defendant, Ed. Long, \$300, with interest from the time it was due until paid. It is further adjudged that the plaintiff pay the costs herein expended, as between him and defendant E. Long."

At the next term of the court the action was stricken from the docket. On January 17, 1894, L. W. Gatewood brought this action, alleging that J. S. Gatewood had given the note and mortgage to B. Lawless, Sr., and that he had bought it from Lawless by a written assignment filed with his petition, the consideration of which, as shown by the assignment, was \$25. He prayed judgment against Long and his children for the debt of \$300 and interest, and the foreclosure of the mortgage. To this suit they pleaded the proceedings in the former action as a bar, alleging that the judgment therein rendered was by

consent, and was entered in settlement of the whole matter. Appellant denied that there was any agreement that the judgment referred to should be a full settlement; and the case having been submitted without any proof on behalf of appellees, except the record itself, the court below dismissed the petition. The correctness of this judgment is the only question on this appeal.

The judgment in the original action quoted above shows on its face that it must have been rendered by consent; for by it the plaintiff recovers the full amount he sued for, and yet it is adjudged that he pay the costs as between him and Ed. Long, which included all the costs made in the case; for Ed. Long only had appeared in the action. The whole cause of action was sued on in that case, and the question arises, can the plaintiff in that case, after taking judgment for a part of the relief sued for, maintain another action for the remainder of the relief sought in that action, but not embraced in the judgment?

In Freeman on Judgments, sec. 272, the rule is thus stated:

"The omission of a court to award relief prayed for is an adjudication, in effect, that the complainant is not entitled thereto. Hence, if in an action on a note, and mortgage judgment is rendered on the note, without any order of sale, this is conclusive that the plaintiff has no lien, and he can not afterwards maintain an action to foreclose his mortgage."

He then goes on to show that this is a necessary corollary from the well-settled doctrine that a judgment is conclusive upon all matters presented by the pleadings which the parties might have litigated and had decided in the cause. The same doctrine is laid down in Van Fleet on Former Adjudication, sec. 114, and Francis v. Wood, 81

Ky., 16; Washington, Alex. & Georgetown Steam Packet Co. v. Sickles, 24 How., 333; 1 Herman on Estoppel and Res Adjudicata, secs. 123, 469.

Under these authorities, we think it clear that the plaintiff in that action, after taking the personal judgment against Ed. Long, at his own cost, as the final judgment in that action, should not be permitted to maintain another action against Ed. Long to subject his life estate in the land to the debt; for this would be to allow him to prosecute two actions on the same cause of action, and recover part of the relief in one by consent, and then the balance in the other action. The same reasons make the first action a bar to the second action, as against the infants, who owned the remainder in the land subject to the life estate of their father, Ed. Long, as tenant by the curtesy. Besides, it would be manifestly unjust to throw the whole debt upon the infants' remainder; and we know of no principle authorizing it to be apportioned, and part of it charged to the remainder-man, in a case like this.

It seems to be clear from the evidence that Ed. Long had little or no property, and that the land was worth much more than the amount of the debt. The long delay in bringing the second suit, the fact that J. S. Gatewood gave the claim to B. Lawless after this judgment was entered, and that Lawless sold it to J. W. Gatewood for a recited consideration of \$25, are persuasive, it was then considered that the lien on this land had been released: and we are satisfied that the chancellor's judgment meets the ends of substantial justice. Judgment affirmed.

## CASE 92—INJUNCTION AGAINST TAX—JUNE 1.

## Bailey, Etc. v. Figely.

## APPEAL FROM HOPKINS CIRCUIT COURT.

**COMMON SCHOOLS—GRADED SCHOOLS—POWER OF COUNTY COURT UNDER SECTION 4464, KENTUCKY STATUTES.**—The county court has no power by virtue of section 4464 of the Kentucky Statutes, to submit to an election the question of establishing a graded school in a district embracing a city of the fourth class and contiguous outlying territory.

**GORDON & GORDON FOR APPELLANTS.**

The section under which the election was held in this case provides that the county judge should order the election when petitioned to do so by ten legal voters in any justice's district, town, or city of the fifth or sixth class in his county, and the power of the county judge is not limited by the fact that a portion of the district lies within the city of Madisonville. School Laws, 1898, secs. 100, 127.

**SAME COUNSEL FOR APPELLANT IN A PETITION FOR A MODIFICATION OF THE OPINION.**

Common school elections are expressly excepted from the constitutional requirements as to registration and are left for the General Assembly to regulate. The statutory provisions as to registration do not apply to common school elections. The voting under the common school law is *viva voce*. Con., sec. 165; Ky. Stats., secs. 4467, 4489, 4458.

**EDWARD W. HINES FOR APPELLEE. (COX & GORDON OF COUNSEL.)**

- 1 Section 4464 of the Kentucky Statutes does not authorize a city of the fourth class to establish a graded school in the method adopted herein. The establishment of a graded school in cities of the fourth class is regulated by section 4489. It would seem that under the charter of cities of the fourth class graded schools may be established by ordinance. Ky. Stats., sec. 3606, unless the act regulating common schools which was passed subsequently to the charter of cities of the fourth class operated to repeal that provision.
2. The elections were not valid because there was no special registration as required by the Kentucky Statutes, sec. 1495.
3. A further objection to the election is that the order under which

It was held was not made at the next regular term after the petition was received. *Doores v. Varnon*, 94 Ky., 507; *Webb v. Smith*, 17 Ky. Law Rep., 1808; *Wilson v. Hines*, 99 Ky., 221.

**MAURICE K. GORDON IN A SEPARATE BRIEF FOR APPELLEE. (EDWARD W. HINES, WM. J. COX AND CLIFTON J. WADDLE OF COUNSEL.)**

1. The county judge has no right under section 4464 of the Kentucky Statutes to call an election for school purposes in a fourth class city. The proposed district if formed as contemplated embracing taxable property outside of the city after valuable buildings had been erected at its cost, would have to give way to the right of the city to assume control alone, at its pleasure, and thus subject those taxpayers of the district in the country to injustice.
2. The county court has no power to change or revoke its orders after the term in which they were made.
3. The petition is not sufficiently certain in designating the site of the proposed school.

Citations: Ky. Stats., secs. 4464, 4489; *Taylor v. Tibbatts*, 13 B. M., 182; *Railroad Co. v. McMurtry*, 6 B. M., 215.

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

In November, 1898, a petition was filed in the county court of Hopkins county, pursuant to the provisions of section 4464 of the Kentucky Statutes, seeking to have a graded school established in common school district No. 4, the boundary of which embraced the city of Madisonville, which is a city of the fourth class, and a large contiguous territory outside of the limits of the city. At the following December term an order was made by the county court requiring an election to be held on the 17th day of January to determine whether the school should be established and the proposed tax levied. Subsequently, at the January term, and before the day fixed for the election, the court entered another order, setting aside the order made at the January term, and directing that the election be held on the 14th day of February thereafter. An election was held on the last day named, which resulted in 225 votes being

cast for the graded common school tax, and 158 against it, and the election of appellants as trustees of the district, who thereafter, assuming to act as such trustees, levied a tax of 50 cents on the property of all white persons and corporations in the aforesaid boundary, and a poll tax of \$1.50 on each white male residing therein over 21 years of age, for the purpose of maintaining a graded common school in the district, and to pay for the erection of suitable school buildings.

Thereupon this action was instituted by appellee, a resident and tax-payer of the city of Madisonville, to enjoin the collection of the tax so levied by the trustees, upon the ground that the election of appellants was illegal and void, because the district boundary in which the vote was taken includes the city of Madisonville, a city of the fourth class, and large contiguous territory outside of the limits of said city, and for this reason the county court had no jurisdiction to make an order to hold such election.

By section 4464 of the Kentucky Statutes, the county court is given jurisdiction of all proceedings for the establishment of graded schools in rural districts and cities of the fifth and sixth classes. It reads as follows: "It shall be the duty of the county judge in each county of this Commonwealth, upon a written petition signed by at least ten legal voters who are tax-payers in the justice's district, town or city of the fifth or sixth classes in his county, to make an order on his order-book, at the next regular term of his court after he receives said petition, fixing the boundary of any proposed graded common school district, as agreed on by the county judge and the petitioners," directing an election to be held in said proposed graded common school district, "not . . . earlier than forty days from the date of said order, for the purpose of taking the sense

of the legal white voters in said proposed graded common school district upon the proposition whether or not they will vote an annual tax, in any sum named in said order, not exceeding fifty (50) cents on each one hundred dollars (\$100) of property assessed in said proposed graded common school district, town or city, belonging to said white voters, or a poll tax . . . not exceeding one dollar and fifty cents (\$1.50) per capita on each white male inhabitant over twenty-one (21) years of age residing in said proposed graded common school district, or both an *ad valorem* and a poll tax, if so stated in the said order, for the purpose of maintaining a graded common school in said proposed graded common school district, and for erecting, purchasing or repairing suitable buildings therefor if necessary." The statute further provides that the proposition to establish a graded common school district as provided for in this section, must be approved in writing on the petition to the county judge by a majority of the trustees of the common school district, and approved in writing on said petition by the county superintendent of common schools, etc.

This section limits the jurisdiction of county courts to proceedings to establish graded schools to cities of the fifth and sixth classes and rural districts. This is made very clear by section 4489, which forms a part of the same article, which regulates the manner in which schools may be established in cities of the first, second, third, and fourth classes. It provides that any city of this class may accept the provision of the common school law, and establish graded common schools, subject to all the provisions thereof, except as specially provided therein, at an election in the manner prescribed in section 4464. But the steps provided are radically different. The order



for the holding of an election in one of these cities may be made by the mayor, who shall in such case perform all of the duties required of the county judge. The number of petitioners is required to be one hundred, instead of ten. The approval of the county superintendent is not required. The location and site of the school house are not required to be set out. The maximum limit of the cost of such school building is fixed at \$100,000, instead of \$15,000. The number, name, and style of the board of trustees shall be determined by themselves, instead of the number being limited to six, but the number of trustees shall not exceed the number of wards in the city. Principals and teachers are not required to hold county certificates. The superintendent of public instruction is directed to pay directly to the treasurer of the graded school the *pro rata* proportion of the school fund due said city from the State. And the aggregate amount of outstanding bonds issued by the board of trustees can not exceed two per cent. of the taxable property of the city, instead of the bonds being limited in amount to \$15,000, as provided for in cities of the fifth and sixth classes, and for rural districts.

In the case at bar, all steps looking to the establishment of the proposed graded common school district, which embraced the city of Madisonville, were had under the provision of section 4464 of the Kentucky Statutes. We think it was the purpose of the statute to draw a sharp distinction between graded schools located in the country and small villages and towns of the State, and the larger cities, and that it was intended that these larger communities should have schools confined to their own limits, and that their control should be vested in officials selected by the voters of their city.

Under these provisions of the statute, we think it is

City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

clear that a city of the fourth class can not be included with outlying territory for the purpose of establishing a graded school, and that the county court had no jurisdiction to direct that an election be held for this purpose; and all steps and orders for this purpose, and the election held pursuant thereto are void.

A number of other errors are relied on, but, in view of our conclusions as to this one, it will be unnecessary for us to consider them.

For reasons given, the judgment is affirmed.

CASE 93—APPORTIONMENT WARRANTS—JUNE 2.

City of Louisville v. Selvage, use, Etc.  
Selvage, use, Etc. v. Lucas, Etc.

APPEAL FROM JEFFERSON CIRCUIT COURT, CHANCERY DIVISION.

1. MUNICIPALITIES—STREET IMPROVEMENTS—ESTIMATE OF TIME BETWEEN FIRST AND SECOND PASSAGE OF ORDINANCE.—Where the first passage of the ordinance was on March 17th, and the second passage was on March 31st, two weeks had elapsed between the first and second passages within the meaning of the charter.
2. SAME—GROSS INEQUALITY.—It seems that where gross inequality in the assessment of street improvements results from the fact that one side of the street is divided into squares by principal streets and the other side not, such inequality is sufficient to invalidate the assessment.
3. SAME—PLEADING.—An amended petition filed to correct an erroneous statement in the original petition that the territory on one side of an improved street was not divided into squares by principal streets, to the effect that the territory on the north side of the improved street contiguous to the improvement was a square bounded on all sides by principal streets, on the north by Victoria Place, which latter street was described as parallel to and a given distance north of and parallel with an improved street, is fatally defective in failing to allege that Victoria Place was a street at the time of the passage of the ordinance.
4. SAME—APPORTIONMENT WARRANTS INCLUDING PROSPECTIVE RE-

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City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

PAIRS.—It is not a fatal objection to apportionment warrants that they include prospective repairs and the costs of foot-ways not properly chargeable, as under the charter of cities of the first class the court has power to correct the assessment to include only the amounts properly chargeable.

5. **SAME—PRAYER FOR GENERAL RELIEF.**—Although the petition did not pray specifically for such amount as might be found due under the apportionment warrants as reformed, such relief might be granted by the court under the prayer for all general relief.

6. **SAME—COSTS AND INTEREST.**—Neither the city nor the property holder is liable for costs or interest until the apportionment is corrected.

**H. L. STONE, CITY ATTORNEY, FOR THE APPELLANT.**

The ordinance was not void. The identical question involved in this case was decided by this court in the case of Fehler v. Gosnell, 99 Ky., 380.

**LANE & BURNETT FOR THE APPELLEES.**

1. A cross-appeal will not lie in favor of an appellee against a co-appellee. McKay v. Mayes, 17 Ky. Law Rep., 827; Marion National Bank v. Phillips, 18 Ky. Law Rep., 159; Mudd v. Mullican, 11 Ky. Law Rep., 417; Murphy v. Blandford, Same, 125; Home Ins. Co. v. Gaddis, 3 Ky. Law Rep., 159; Gaar v. Louisville Banking Co., 11 Bush, 180; Smith v. Northern Bank, 1 Met., 575.
2. There is no error in the judgment in favor of the defendants in the court below as to whom the petition was dismissed.
3. The ordinance upon which the claim in this case was predicated is the ordinance that was under consideration in the case of Gosnell v. City of Louisville, 14 Ky. Law Rep., 720, and contains the same vice that was condemned by this court in the case of Fehler v. Gosnell, 18 Ky. Law Rep., 238; Burnett's Code, pp. 519, 520; Louisville v. Meyer, 17 Ky. Law Rep., 666. On the face of the petition it is manifest that the plaintiffs were entitled to a judgment against the appellant, but were not entitled to any judgment against the abutting property owners. The practice is as set out in the opinion of this court in Cooper v. Nevin, 90 Ky., 95, that the plaintiff suing on the erroneous apportionment may if he desires it, have a corrected apportionment, but in this case plaintiffs did not desire a corrected apportionment but elected to stand on their contract with the city of Louisville.

**WM. KRIEGER AND W. T. COLSTON FOR SELVAGE.**

(No brief in the record.)

City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

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JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

Selvage brought suit, for the use of the Western Bank, against appellees Lucas, *et al.*, upon apportionment warrants for the improvement of Hill street from the center line of Fifth street and St. James court to the East line of Sixth street, under an ordinance providing for the improvement of the carriageway of the part of Hill street mentioned with vitrified brick pavement, and for making footway crossings across intersecting streets and alleys. The ordinance provided that the cost of the improvement should be apportioned against the land contiguous thereto on the south included in the quarter squares abutting upon the improvement, and upon the contiguous territory on the north as far as a line 522.29 feet north of and parallel with Hill street. A demurrer to the petition was sustained, an amended petition was filed, and to the petition as amended a demurrer was filed and sustained. The plaintiff declined to plead further, and judgment was rendered dismissing the petition, but giving judgment over against the city of Louisville under the alternative prayer in the petition. Both the city and the contractor have appealed from this judgment.

One of the grounds urged in support of the demurrer was that two weeks had not elapsed between the passage of the ordinance by the two boards, it being passed by the board of councilmen on March 17th and by the board of aldermen on March 31st. This question has been settled in the case of *Fehler v. Gosnell*, 99 Ky., 385, [35 S. W., 1125].

The trial court, in a brief opinion, sustaining the demurrer, referred to the opinion in *Zable v. Baptist Orphans' Home*, 92 Ky., 89 [17 S. W., 212], with regard to the fixing of the grade of the street improved. In that case the pe-

City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

tition was held defective as failing to aver that the city council had fixed the grade of the street; but the court evidently overlooked the averment in the original petition in this case fixing the grade of Hill street within the limits improved.

The main contention on behalf of appellees in support of the proposition that the petition was fatally defective is based upon the provision of the ordinance fixing the limits of the territory to be assessed, and the averments of the original and amended petitions with respect thereto. The original petition alleged specifically that the territory on the south of Hill street was divided into squares by principal streets, which were named, and their situation stated. But it was averred that on the north of the improvement the territory was not divided into squares by principal streets, but that at the time of the passage of the ordinance it was expected and believed that Magnolia avenue would be opened and dedicated as a public street, and extend parallel with Hill street at a distance of 1,104.59 feet north, and that no other street would be opened or dedicated between Hill street and Magnolia avenue between the Eastern and Western limits of the improvement. This would make the center line between Hill street and Magnolia avenue coincide with the northern limit of the assessment district as fixed by the ordinance. The ruling of this court in *Preston v. Roberts*, 12 Bush, 570, that, where property was not divided into squares, gross inequality in apportioning the cost of an improvement upon the two sides could not be permitted, would seem to be applicable to this apportionment under the averments of the original petition, though, in a number of cases such inequality has been held unobjectionable where the property was divided into squares by principal streets. *Nevin v. Roach*, 86 Ky.

City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

499, [5 S. W. 546]; Cooper v. Nevin, 90 Ky. 85, [13 S. W. 841]; Baker v. Selvage & Snider, 7 Ky. Law Rep., 838.

But in the amended petition all the averments as to the contiguous territory upon the north of Hill street not being divided into squares by principal streets were withdrawn, as having been made by mistake, and it was averred "that the territory on the north side of Hill street, . . . contiguous to the improvement . . . is a square bounded on all sides by principal streets . . . on the north by Victoria Place, which latter streets is parallel to and 1,104.58 feet north of and parallel with Hill street;" with a further averment that it was not intended or probable that the city would ever open another principal street through said square. This averment is relied upon by appellant Selvage and by the city to sustain the legality of the apportionment alleged in the petition, upon the theory that, though it was unnecessary to allege how far distant the assessment limit upon the north was from Hill street, the limit which was alleged coincided with the center line of the square described in the amended petition. But there is no averment that at the time the ordinance was passed providing for the improvement any such street existed as Victoria Place; and this, it seems to us is fatal to the contention of appellants, Selvage, *et al.*, upon this point. Under the pleadings in this case, appellant Selvage was not entitled to recover according to the apportionment approved by the general council.

A further ground relied on by appellees Lucas, *et al.*, is that the general ordinance concerning the improvement of streets required from the contractor a guaranty to keep the pavement in repair for five years, and to deposit bonds equal in amount to 10 per cent. of the contract price as security for such repair, it having been held in

City of Lou. v. Salvage, use, &c. Salvage, use of, &c., v. Lucas, &c.

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Fehler v. Gosnell (18 R., 238; [35 S. W., 1125]), that the amount which such an assessment had been increased on account of that guaranty could not be recovered by the contractor against the property-holder, but was properly chargeable against the city at large. A further objection by appellees was that the ordinance provided for the assessment of the cost of the footway crossings against the contiguous property, and that this cost under "An act to amend the charter of the city of Louisville" (Burnett's Code, p. 515), provided that the cost of such crossings should be paid by the city of Louisville out of a tax authorized to be imposed by the city, and therefore can not be assessed against the property-holder.

But, while these objections are ample to prevent the recovery of the amounts apportioned and claimed in the petition, they do not, in our opinion, render the ordinance void, or the petition fatally defective. The question as to the 10 per cent. guaranty has been already passed upon in the case of Fehler v. Gosnell, *supra*, and it was there held that the contractor was still entitled to recover except to the extent the property-holder's assessment had been increased on account of the guaranty. It was also there held that under the provisions of the act for the government of cities of the first class that "no error in the proceedings of the general council shall exempt from payment after the work has been done as required by either the ordinance or contract, but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned [Ky. St., sec. 2834]," the court should correct the apportionment, and render judgment for the amounts which should have been assessed against the property. We see no valid reason why the rule so laid down does not apply

City of Lou. v. Selvage, use, &c. Selvage, use of, &c., v. Lucas, &c.

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equally to the attempted assessment of the cost of foot-way crossings, and to the inequality of the apportionment as between the two sides of the street, if the facts be as stated in the original petition.

The averments of the petition showed the cost, under the contract, of each part of the improvement made, and in the late case of *Gosnell v. City of Louisville* (20 R., 523, [46 S. W., 722]), we held that 10 per cent. of the contract price was a fixed and liquidated proportion thereof for the repairs contemplated by the guaranty, and that that amount was the proportion of the contract price from the payment of which the property-holders were exempted.

There would seem, therefore, to be little difficulty in the court making a correction of the apportionment upon the averments of the petition in this case. It is true that this relief is not expressly prayed in the petition, but section 2834, Kentucky Statutes, would seem to require the court to make such correction under the prayer for all general relief.

Of course, under the doctrine in *Gosnell v. City of Louisville*, *supra*, neither the city nor the property-holder is liable for costs or interest until the apportionment is corrected.

For the reasons stated, the judgment is reversed, with directions for further proceedings in conformity with this opinion, all parties being allowed to amend if desired.

RESPONSE TO PETITION FOR REHEARING BY JUDGE DURELLE.

It is immaterial under which general ordinance concerning streets the contract for the improvement of Hill street was made, for the other defect stated avails to defeat recovery upon the apportionment warrants as issued.

The petition for rehearing is overruled.



## CASE 94—ACTION TO DECLARE TRUST—JUNE 2.

## Bright's Executors v. Swinebroad, Etc.

## APPEAL FROM GARRARD CIRCUIT COURT.

## 1. EVIDENCE—HUSBAND AND WIFE—TRANSACTIONS WITH DECEDENT.—

In an action for the benefit of a married woman to declare a trust in certain personalty against an estate in the hands of executors, as the action might have been brought by the wife alone, her husband is a competent witness in her behalf, but as to transactions with a person who was dead at the time of the proposed testimony, he was incompetent to testify as to any facts as to which the wife herself was incompetent.

## 2. SAME—TRUSTEE FOR WIFE.—In such an action the trustee for the wife is competent to testify as to transactions with the testator—

he not being in any sense an agent for the wife.

## W. G. WELCH AND HILL &amp; MROBERTS FOR THE APPELLANTS.

1. Parol trusts. Perry on Trusts, secs. 96-97-100; 27 Am. & Eng. Ency. of Law, 57.
2. Husband not competent witness. Civil Code, sec. 606, sub-secs. 1, 2; Howard, &c., v. Tenny, &c., 10 Ky. Law Rep., 94; 29 Am. & Eng. Ency. of Law, 57.

## R. H. TOMLINSON FOR THE APPELLEE. (R. P. JACOBS OF COUNSEL.)

1. The evidence is sufficient to establish a trust in favor of the appellee.
2. Her husband was a competent witness under section 606 of the Civil Code.
3. The court erred in sustaining the exceptions of appellant to the testimony of G. B. Swinebroad.

Citations: Beach v. Cummins, 13 Ky. Law Rep., 881; Williamson v. Yager, 13 Ky. Law Rep., 273; Roche v. George's Exr., 13 Ky. L. R., 493; Same, 14 Ky. L. R., 584; Barkley v. Lane's Exr., 6 Bush, 587; Barton v. Barton, 80 Ky., 215; Perry v. Riding's, Gdn., 9 Ky. Law Rep., 536; Merriwether v. Morrison, 78 Ky., 572; Stephenson's Admr. v. King, 5 Ky. Law Rep., 378; Southerland v. Southerland, 5 Bush, 591; Booth v. Vanarsdale, 9 Bush, 717; Wise v. Foote, 81 Ky., 13; Flood v. Pragoff, 79 Ky., 607; 11 B. M., 358; Arnold v. Bryant, 8 Bush, 672; Civil Code, sec. 607, and sub-sections; 1 Met., 651.

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Bright's Exrs. v. Swinebroad, &c.

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(The Reporter finds filed with the record an unsigned brief for the appellee, to which is appended this list of citations): 6 Bush, 587; Civil Code, sec. 134; Posey v. Green, 78 Ky., 162; Old Code, sec. 674; Civil Code, sec. 606; Perry on Trusts, vol. 1, sec. 99.

JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

Kate B. Swinebroad instituted this action, 15th of July, 1897, in the Garrard circuit court, against G. B. Swinebroad, trustee, S. Hubble, R. L. Hubble, William Hubble, committee for S. Hubble, and the executors of Greenberry Bright.

The claim of the plaintiff is, in substance, that the first-named Hubbles executed their note to Greenberry Bright, November 3, 1896, for \$444.06. It also appears from the petition that Greenberry Bright departed this life the 3d of December, 1896, and that during his lifetime, to wit, on the 13th of November, 1896, he gave and delivered to the defendant G. B. Swinebroad, in trust for the plaintiff, the aforesaid note, together with one certain other note; and that said Bright, by his act in giving and delivering said note to said Swinebroad, and by his instructions given at the time of the delivery of the said note on the 13th day of November, 1896, made and constituted the said G. B. Swinebroad, trustee for the plaintiff to the amount of \$1,000 in said notes; and that in pursuance to said trust and instructions given to him by the said Greenberry Bright the defendant Swinebroad, on or about January 1, 1897, collected and paid over to plaintiff the proceeds of one note, amounting to \$795.45, but said Swinebroad has not paid over to her the balance of the said \$1,000 of trust money; that he now has in his possession said note against defendants Hubbles; and that there is a balance due to the plaintiff of said \$1,000 to the amount of \$204.55, with interest from the 13th of Novem-

ber, 1896; and that Swinebroad, in not collecting and paying to plaintiff the said \$204.55, with interest, aforesaid, has failed to execute fully the trust imposed on him by said Greenberry Bright, and that he has failed to fully execute the provisions of said trust; that after the execution of said trust there will be a balance of said note against said defendants Hubbles going to the executors of said Bright. Plaintiff finally prayed for process against defendants, and that the court compel the said Swinebroad to collect said note, and pay to her the amount aforesaid, and for judgment against Hubbles on said note, and that, after the payment to this plaintiff the sum aforesaid, the balance on said note to be paid according to the directions of the court; and prays for all proper relief.

The court sustained the demurrer of Bright's executors to the petition, with leave to plaintiff to amend. The Hubbles indicated their readiness to pay the debt, and also pleaded that they tendered the amount of the note to the executors of Greenberry Bright on the 8th of February, 1897, and demanded the note, which they failed to produce, and announced their readiness to pay the money according to the judgment of the court.

An amended petition alleged that the said Bright's acts, in giving and delivering said note to said Swinebroad, and by his instructing him at the time of said delivery that he gave to said plaintiff \$1,000 of same, and the same to be paid out of the proceeds of said note, directed said Swinebroad to collect said note, and, when collected, to pay the \$1,000 to the said plaintiff out of the proceeds of said notes aforesaid, and thereby constituted said Swinebroad trustee for that purpose.

A demurrer was sustained to the petition as amended.

A second amended petition was filed, making more spe-

cific the transaction hereinbefore referred to, and the demurrer of Bright's executors thereto was overruled.

The answer of Bright's executors is a denial of the gift or transaction set up by the plaintiff, and pleaded that the said note was placed in the hands of said G. B. Swinebroad, who was an attorney at law, for collection, and for no other purpose; and that as executors they are the owners of and entitled to the possession of said note. Wherefore they make this answer a cross petition against the defendant Swinebroad, and ask that plaintiff's petition be dismissed, and that they be adjudged to be the owners of said note, and finally pray for their costs.

The reply of plaintiff is a denial of the affirmative allegations of the answer and cross petition.

The answer of G. B. Swinebroad to the cross petition of Bright's executors substantially shows that the notes were placed in his hands for the purpose and under the conditions claimed by plaintiff.

The answer of G. B. Swinebroad to the petition of plaintiff shows that he received the notes under the circumstances and directions stated in plaintiff's petition, and prays judgment against the Hubbles on the note in question, and that same be paid over to him, as trustee for Kate Swinebroad, and for all proper relief.

After the issues were fully made up, and proof taken, the court, upon final hearing, overruled the exceptions of Bright's executors to the deposition of G. B. Swinebroad, taken by plaintiff, who, it appears, was the husband of the plaintiff. The court sustained the exceptions of Bright's executors to the deposition of G. B. Swinebroad, the alleged trustee. It further appears from the judgment that plaintiff only read upon the trial so much of G. B. Swinebroad's deposition as was taken in chief, and only

that part of Mrs. George Wood's deposition as was taken in chief. Bright's executors declined to read any of the depositions taken in their behalf. The court then adjudged that certain notes, including the note on the defendants Hubbles, were placed in the hands of G. B. Swinebroad to be by him held in trust for plaintiff's use and benefit, and that it appeared that the trustees had collected the sum of \$795.45, which had been paid to plaintiff, leaving a balance of \$204.55, with interest from November 13, 1896; and that the trust to this amount, to wit, \$204.55, with interest aforesaid, attaches to the said Hubble note. The court then adjudges that the Hubbles pay to Swinebroad said sum, with interest as aforesaid, which shall be held by said Swinebroad in trust for the use and benefit of plaintiff, and when said sum is so paid the payment shall operate as a credit to said Hubbles on said note. The case is retained on the docket for the purpose of enforcing this judgment. The counterclaim of Bright's executors is dismissed, and the plaintiff adjudged her costs as against them to be made of assets unadministered. To the judgment adjudging this trust and dismissing Bright's executors' counterclaim, Bright's executors except, and pray an appeal to the Court of Appeals, which is granted.

One of the questions of importance in this case is to determine as to the competency of G. B. Swinebroad, the husband, as a witness. It will be seen from his deposition that he testifies as to conversations, etc., upon the part of Greenberry Bright during his lifetime, which statements and conversations upon the part of Bright tend to sustain plaintiff's claim. It does not appear that the transaction or contract was made with the witness. It will be seen from the deposition of G. B. Swinebroad that he testified, in effect, that the decedent, Bright, told witness' wife and

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Bright's Exrs. v. Swinebroad, &c.

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witness repeatedly that he had \$1,000 to give her, and that she was provided for in his will. These statements were made at different times and places. One of the statements of Swinebroad is as follows: "He (meaning Bright) said to my wife at that time, 'Now I will give you the \$1,000 I have been talking about giving you, and you are also provided for in the will.' He made that statement to my wife in my presence. That statement was made while going to Middlesborough, in July, 1895. All of the statements were made to me and to my wife in my presence." In answer to another question by plaintiff, witness says: "He told me on the 12th of November, 1896, or about that date, to tell Bright Swinebroad to come up to his room the next morning, that he had made up his mind, and planned as to how he would give Kate the \$1,000 that he had been promising her; that he had some notes that he would turn over to him to collect and pay over to his mother. I told Bright Swinebroad what his grandfather had told me, and for him to go and see him the next morning, and he did go."

It will be seen from an examination of the transcript that the testimony of the witness in question is very material, and, if it had been excluded, no doubt the court would have rendered a different judgment.

It is earnestly insisted for appellant that the court erred in overruling the exceptions to the deposition of the husband. It is earnestly insisted for appellee that under the law as it now stands the husband was a competent witness; that the property sued for was the individual property of the plaintiff, and that the husband had no control nor pecuniary interest at all in the recovery sought; and we are referred to section 606 of the Civil Code, which, in effect, provides that in actions which

might have been brought by or against the wife, if she had been unmarried, that in such actions either but not both husband and wife may testify. Under the act known as the "Weissinger Act" this suit was prosecuted in the name of the plaintiff alone; and it may be well said that as a matter of law the husband had no pecuniary interest in the controversy, and was not a party to the suit, and inasmuch as the wife did not testify, under the provisions of the Code, *supra*, the husband would be entitled to testify; and to a certain extent this contention is tenable.

Under the common law neither the husband nor the wife could testify for or against each other, but the Code of Practice has modified or changed the rule of the common law to the extent indicated in the section hereinbefore referred to. But it is also provided in the same section that no person shall testify for himself concerning any verbal statement, or any transaction with, or any act done or omitted to be done . . . by one who is dead when the testimony is offered to be given, except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age, and of sound mind, heard such statement, or was present when such transaction took place or when such act was done or omitted to be done; subject, however, to certain other exceptions, which follow in the same section, none of which are applicable to this case.

It is clear that the husband was entitled to testify to any fact within his knowledge that the wife could have been allowed to have testified to if the same fact had been within her knowledge, and she had elected to testify instead of her husband.

Upon a careful consideration of the authorities and the reason of the law, we are of opinion that the husband could only testify as to such transactions as the wife could have

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Louisville Banking Company v, Anderson, &c.

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testified to if the same had been within her knowledge. It is clear that the wife was incompetent to testify to the conversations or transactions had with the decedent, or to the promises made by him, and, this being true, we are of the opinion that the husband could not testify to such transactions or conversations; and to that extent he was incompetent, and the court below should have so held.

We are further of the opinion that the court below erred in excluding the deposition of G. B. Swinebroad. He was not a party plaintiff in the action, and had no pecuniary interest whatever in it, and although, in a sense, the trustee of the plaintiff, he was not her agent in the conversation or transaction had between him and the decedent; hence it seems clear to us that he was a competent witness, and for the purpose of this appeal we will consider his testimony so far as the same is otherwise competent.

Taking the competent evidence together, we think the judgment of the court below is sustained by the law and facts, and said judgment is affirmed.

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CASE 95—ACTION FOR NEW TRIAL—HOMESTEAD—JUNE 2.

## Louisville Banking Company v, Anderson, Etc.

## APPEAL FROM LOGAN CIRCUIT COURT.

**HOMESTEAD—FAMILY.**—A daughter who is a married woman of full age, between whom and her husband there has been neither an actual nor a legal severance of the marriage bond, and for whose support the husband is still bound both legally and morally to provide, does not constitute a family within the exemption statute; nor does a granddaughter temporarily visiting in the debtor's family.

(The opinion in this case was originally delivered on the 11th of February, 1898. After the opinion had been delivered, it was



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Louisville Banking Company v. Anderson, &c.

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withdrawn to permit appellant to suggest the death of T. N. Anderson and to revive against his representatives; and the revivor having been had the original opinion was re-delivered.)

**BARNETT, MILLER & BARNETT FOR APPELLANTS.**

1. Appellee has been guilty of negligence; has not shown due diligence in taking care of the equity case, and a new trial should not have been granted him. Civil Code, sec. 340, sub-sec. 3; Phillips v. Skinner, 6 Bush, 662; Charles v. Bain, 9 Ky. Law Rep., 104; Heintz v. Christman, 9 Ky. Law Rep., 107; Brannin v. Trent, 9 Ky. Law Rep., 577; Ross v. L. & N. R. R. Co., 13 Ky. Law Rep., 801; Voltz v. Tutt, 13 Ky. Law Rep., 877; Vowells v. Com., 15 Ky. Law Rep., 574; Herold v. Fisk, 16 Ky. Law Rep., 63; 16 Am. & Eng. Ency. of L., 536; Elmore v. McGrary, 80 Ind., 544; Brock v. South, &c., Ala. R. Co., 65 Ala., 79; Falkenburg v. Gorman, 71 Wis., 8; Mayer v. Duke, 72 Tex., 445; Green v. Bulkley, 23 Kas., 130; Brown v. Warren, 17 Nev., 417; Bobyshell v. Summers, 40 Mo., 172; Davis v. Presler, 5 Smed. & M. (Miss.), 459; Doat v. Maltby, 2 La. An., 583; Gelton v. Hawkins, 2 J. J. Mar., 1; Brevard v. Graham, 2 Bibb., 177; Gater v. Mullen, 23 Ind., 562; White v. Ryan, 31 Ala., 400; Davis v. Winants, 18 N. J. L., 306.
2. Appellee is a widower without a family dependent upon him; his daughter, who lives with him, has a husband who is a traveling man and earns a living. The daughter only stays there during the summer months. The granddaughter has a father and mother, who are able to and do support her, and her staying with her grandfather is only a summer sojourn. The appellee is not a housekeeper with a family within the meaning of the statute, and is not entitled to homestead exemptions. Ky. Stats., sec. 1702; National Bank of Lancaster v. Slavin, 1 Ky. Law Rep., 315; Carter v. Adams, 9 Ky. Law Rep., 91.

**W. F. BROWDER AND M. P. SLOSS ON THE SAME SIDE.**

1. The lower court erred in opening the equity suit of Louisville Banking Company v. Anderson, &c., vacating the judgment therein.
2. It was error to grant to appellee Anderson a homestead.  
Citations: Beckham v. Morrison, 14 Ky. Law Rep., 241; Ganzer v. Shiffbauer (Neb.), 59 N. W. R., 98; 12 Am. & Eng. Ency. of Law, —; Doughty v. Moss, 1 Bush, 161; Gaines v. Casey, 10 Bush, 96; Brown, Bro. & Co. v. Martin, 4 Bush, 49.

**JAMES H. BOWDEN FOR THE APPELLEE.**

1. The new trial of Anderson was properly granted. Anderson should not have been permitted to suffer because of the defer-

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Louisville Banking Company v. Anderson, &c.

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ence of his young attorney to the age and experience of his senior counsel and the latter's quixotic consideration for the junior counsel.

2. The judgment is right on the merits. 11 Bush, 622; 90 Ky., 183; Same, 566; 78 Ky., 630.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

In September, 1894, the appellant, the Louisville Banking Company, obtained a judgment against appellee Anderson, upon which execution issued, which was levied on the property on which he was living. Appellee Price, who was the sheriff, set apart the property levied on as a homestead to Anderson, and the company brought suit in equity against Anderson and Price to vacate the action of the sheriff in setting apart the homestead, and to subject the property to its debt. Service of process was had on Anderson on January 14, 1895, twenty-one days before the court convened. The equity docket was called on the third day of the term, no answer was filed, and the case was submitted for judgment, which was rendered by default on the last day of the term, forty-one days after service of process. On March 29th, Anderson filed his petition in equity, stating and denying the material averments of the company's petition in equity, averring the grounds upon which he relied in his claim for homestead, and prayed for the vacation of the judgment and a new trial, upon the ground that he was prevented from defending the company's suit in equity by unavoidable casualty and misfortune, viz.; that he became sick before the commencement of the term, and remained so during the entire term to such a degree that it would have been dangerous to his life to have attended court, on account of the inclemency of the weather and his extreme age. He further averred that he had employed an attorney to represent him, but his attorney was not so advised that he could prepare an answer without

the presence of his client; and that the attorney was not present at the calling of the case, or did not hear it called. An injunction was granted to prevent the sale of the property under the judgment in the Banking Company's suit in equity, issue was joined upon the averments of Anderson's petition, and the case submitted, both upon the prayer for a new trial and upon the merits of Anderson's claim to a homestead.

The case, therefore, presents but two questions:

First—whether a case of unavoidable casualty or misfortune was made out by the evidence introduced tending to show that Anderson's counsel were negligent, or whether such negligence on the part of the attorneys must be imputed to the client, and, Second—Whether the evidence introduced upon the trial of the case upon its merits entitled Anderson to a homestead in the property.

It is unnecessary to consider the first question, as the second is decisive of the case.

It appears that Anderson, who was a widower, had formerly owned the property in question, sold it, and repurchased it in 1892; that in 1893 he rented it to one Browder, retaining part of the house for his own use, and boarded with Browder for the rent of the place; that on August 18, 1894, his daughter, Mrs. Brownfield, came to live with him, and his granddaughter, the child of another daughter; that he furnished the provisions, and his daughter, assisted at times by his grandchild, did the cooking and other housework.

It is evident that no claim of being a *bona fide* housekeeper with a family can be based upon the presence of the granddaughter. She was a mere visitor; her parents were living; it appears from the record they were able to provide for her, and Anderson was under no legal or moral obligation for her support.

The claim based upon the daughter's residence with Anderson presents a narrower question. But without disputing the contention of Anderson's counsel that a man may be a *bona fide* housekeeper with a family notwithstanding the fact that he became such for the purpose of asserting a claim for homestead, we are of opinion, under the circumstances of this case, that the married daughter's residence in the house with him did not constitute him a *bona fide* housekeeper with a family within the meaning of the statute. Anderson's testimony as to the relations between his daughter and her husband is purely hearsay. It appears that, on a number of occasions, she had come to her father's and staid with him for a longer or shorter period. She testifies that, except for brief intervals, she had lived with her husband during all of their married life, some twenty-five years; that her husband was, at times, dissipated, and on such occasions spent his salary; that her father had, at times, while she was living with her husband, contributed to her support by sending her small sums of money; that the relations between herself and husband were kind; that, until she came to her father's in August, 1894, her husband had contributed to her support, but that since that time he had not so contributed, except to a very trifling amount. It appears further from her testimony that for about ten months after the time she came to her father's, her husband had employment as traveling salesman. There appears to have been no interruption in the existence of the marital relation between her and her husband, and no intention to separate permanently, so far as the record discloses.

As said by Judge Holt in *Ellis v. Davis* (90 Ky., 185 [14 S. W., 74]), speaking of what is necessary to constitute a *bona fide* housekeeper with a family:

"This court has repeatedly decided that one can not be so regarded, unless there are those living with him who not only bear a dependent relation to him, but whom he is under a natural or legal obligation to maintain."

And in *Bosquett v. Hall* (90 Ky., 567, [13 S. W., 244]), it was said: "And accordingly an infant brother or sister, or aged and helpless parent, or even a bastard child, may and have been held to constitute a family in the meaning of the statute."

And while we do not dispute that a widowed daughter or a daughter abandoned by her husband, might constitute a *family* within the meaning of the act, we are clearly of opinion that a married woman of full age, between whom and her husband there has been neither an actual nor legal severance of the marriage bond, and for whose support the husband is still both legally and morally bound to provide, can not properly be held to constitute a family of the debtor within the meaning of the statute under consideration. The statute should, and does, receive from this court a liberal construction in favor of the debtor, but to so construe it as to include the case at bar would be a step further than we are inclined to go.

For the reasons given the judgment is reversed for further proceedings consistent with this opinion.

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CASE 96—ACTION ON CONTRACT—JUNE 3.

### Taulbee v. Moore.

APPEAL FROM MONTGOMERY CIRCUIT COURT.

1. EVIDENCE—BREACH OF BUILDING CONTRACT—CONCLUSION OF WITNESS.—Where the building contract sued on was in parol it is not error to permit the plaintiff to state generally that the house was built according to the contract.

Taulbee v. Moore.

2. **SAME—EVIDENCE IN CHIEF.**—The order in which evidence is to be introduced is within the sound discretion of the trial court; and this court will not reverse for a refusal to permit appellant to introduce additional evidence in chief after the appellee had closed his testimony.
3. **MEASURE OF DAMAGES—BREACH OF BUILDING CONTRACT.**—The measure of damages for a breach of a building contract where there has been substantial compliance is the difference between the value of the building constructed as it is and what it would have been worth if it had been constructed according to contract.
4. **APPEAL—IMMATERIAL ERROR.**—The finding of the jury that there had been no damage for breach of contract makes any error in the criterion of damage immaterial.

ED. C. O'REAR FOR APPELLANT.

1. **BUILDING CONTRACT—DAMAGES TO OWNER FOR BREACH OF—WHAT IS PROPER MEASURE.**—The owner of a lot contracts with builder to erect house of certain kind thereon. The contractor builds a materially different kind than that contracted for. We insist that the measure of damages to owner is not the difference between the character of the house actually built and the one contracted for; but is the sum necessary to construct a building as contracted for; or to remodel or reconstruct the one built until it is according to the contract. *Keihl v. Kline*, 15 Ky. Law Rep., 158.
2. **EVIDENCE—OPINION.**—It is error to allow a witness in a controversy concerning whether a house was built according to contract, to state his opinion that it was built according to contract, or to say that the work was done in a workmanlike manner.
3. **EVIDENCE—PRACTICE UPON THE INTRODUCTION OF.**—The party holding the burden announced through and after the other party had concluded his evidence, the party first named proposed to offer another witness whose testimony was material and would have been in chief, under an avowal from his counsel that he had misunderstood the point upon which the witness was to have been used, and was thereby misled into the error. We insist that it was error to exclude the testimony of the witness. *Com. v. Patterson*, 10 Ky. Law Rep., 167; *Cumberland T. & T. Co. v. Weaver*, 13 Ky. Law Rep., 207; *Wandstradt v. Percival*, 4 Ky. Law Rep., 834.
4. **INSTRUCTIONS.**—The court should have submitted to the jury in appropriate instructions the respective contentions of plaintiff and defendant as to what was the contract in litigation; and

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Taulbee v. Moore.

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then in a direction to find for the one or the other according as they might find the contention of that one was sustained by the evidence. It was error to give the jury an instruction to find for the plaintiff unless the defendant proved the contract was different from what plaintiff claimed it was. *Taylor v. Armstrong*, 5 Ky. Law Rep., 252; *National Bank v. Mattingly*, 92 Ky., 653.

SAME COUNSEL FOR APPELLANT IN A PETITION FOR A REHEARING.

W. A. DEHAVEN AND TYLER & APPERSON FOR APPELLEE.

1. In a suit upon a contract for the construction of a building, it is competent for a witness to give his opinion that the work was done in a skillful manner or according to contract. 1 Greenl. Ev., p. 440; *Jones on Ev.*, secs. 369, 362, 365; *Ill. Ry. Co. v. Van-Horn*, 18 Ill., 257.
2. It was not an "abuse of discretion" for the court to exclude the testimony of appellant's son offered in chief after plaintiff had closed his testimony. *Jones on Ev.*, sec. 811; *Mutual Life Ins. Co. v. Thompson*, 94 Ky., 253.
3. Instructions giving undue prominence to certain portions of the testimony should not be given, hence the court properly rejected instructions A and C asked by appellant. *Flood v. Pragoff, &c.*, 79 Ky., 607; *Ky. Tobacco, Assg. v. Ashley*, 5 Ky. Law Rep., 184; *Com. v. Hourigan*, 89 Ky., 305; *McLaughlin v. Lou. Electric Light Co.*, 18 Ky. Law Rep., 693; *Com. v. Gray*, 17 Ky. Law Rep., 354; *McClurg v. Inglehart*, 17 Ky. Law Rep., 913; *L. & N. R. R. Co. v. Banks*, 17 Ky. Law Rep., 1065.
4. The measure of damages for failing to construct a house according to contract is the difference in value between the house as constructed and as it should have been under the contract. *Short v. Moore, &c.*, 19 Ky. Law Rep., 1225.

JUDGE BURHAM DELIVERED THE OPINION OF THE COURT.

This suit was instituted by appellee to recover a balance of \$258.68 alleged to be due upon a contract made with appellant to build an addition to his house at an agreed price of \$458.68, \$200 having been paid in cash.

Appellant, in his original answer to appellee's claim, said that the work was not done in a workmanlike manner, and alleged that it was a part of the parol contract between them that the brickwork was to be executed so as to leave the inside surface of the walls as smooth as the outside;

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Taulbee v. Moore.

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that the joints were all to be struck and pointed, so as not to require plastering, and that appellee had violated this provision of the contract, and left the inside surface of the wall so rough and unsightly as to require it to be plastered, which would cost him at least forty dollars; that he had been damaged in the sum of twenty-five dollars by reason of the lintels put in the building not being of good material; that the guttering had been changed, so as to cause him to spent three dollars; that appellee failed to make a valley in the roof, which caused the water to run down into the building, to his damage in at least the sum of ten dollars, and that he had allowed rubbish to fall into his cellar, to his damage of two dollars and fifty cents; that appellee was indebted to him for forty-five dollars for medical services rendered to one Hill, at his special instance and request, and for an account due the firm of Taulbee & Hayden, which had been assigned to him, for twenty-nine dollars; and by an amended petition appellant alleged that it would cost him at least \$300 additional expense to take down the brick walls erected by appellee and rebuild them with struck joints on the inside, as provided by the contract,—all of which he pleads by way of set-off and counterclaim against appellee.

The trial resulted in a verdict and judgment for appellee for the amount sued for, which we are asked to reverse on account of several alleged errors to appellant's prejudice.

It is contended that the court erred in permitting appellee to state to the jury that the work was done according to the contract.

As the contract was a verbal one, and the parties differ essentially as to its terms, it seems to us, after giving his version of it, appellee was entitled to state



to the jury that the work had been performed in accordance therewith.

Another ground relied on is that the trial court erred in refusing to allow appellant to introduce his son as a witness to testify to facts which should have been properly introduced in chief after appellee had closed his testimony.

The only reason assigned why this witness was not introduced at the proper time is that counsel for appellant did not know what his testimony would be at that time. This is a matter that rests very largely in the discretion of the trial judge, and will not be interfered with here unless it is manifest that there has been a palpable abuse of discretion, which fact does not sufficiently appear from the testimony in the record.

But the chief ground of complaint is that the trial court erred, to appellant's prejudice, in the instruction as to the measure of damages which reads as follows:

"The measure of damages in the case is the difference, if any, between the value of the building constructed as it is and what it would have been if it had been constructed according to the contract."

Appellant insists that it was the duty of the court to have told the jury "that, if they believed from the evidence that plaintiff was to so construct the building as to make the inside of the wall as smooth as the outside, and of first-class material, and had not done so, that they should find for appellant, and fix the damages at such a sum as they believed from the evidence would be necessary to take away said walls and replace them by walls of first-class material and workmanship, and as smooth on the inside as on the outside."

There is no testimony in this case which conduces

to show that the walls erected by appellee for appellant were not a reasonably good job, and fitted for the purpose for which they were intended. There were no plans or specifications for appellee's guidance in their construction, and they seem in the main to conform to the designs testified to by both parties. The proof shows that it is impracticable to build a brick wall only one brick thick so as to leave the surface on both sides perfectly straight and smooth. The usual building brick is twice as long as it is wide, and it is therefore manifest that when laid laterally in the wall there is bound to be a space between them for mortar to hold them together, and that bricks laid in this way will necessarily project a little further on one side than header courses of the same size brick. This difficulty can be easily overcome in thicker walls, but it is not apparent how it could be accomplished in a wall only nine inches thick. Besides, the testimony shows that appellant paid \$200 on the job, after the greater part of the brickwork had been completed, without objection to the manner in which it was being done.

We do not think the measure of damages contended for by appellant is a sound or just one. "The rule of law is that, where a party sustains loss by reason of a breach of contract that he is, so far as money can do it, entitled to be placed in the same situation with respect to damages as if the contract had been performed, and that these damages should be limited to such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." (See Lawson on Contracts, p. 250.)

If appellant is right in his theory, appellee might be mulcted in damages in a sum equal to the entire contract price agreed to be paid to him for the job of work on ac-

count of a comparatively inconsequential failure to literally comply therewith, and which did not affect the real value of the work done by him. Whilst it may be true that if a contractor should disregard the plans and specifications under which a building was to be erected, and erect one substantially dissimilar, the owner might refuse to receive or pay for the property, but where there has been, as in this case, a substantial compliance, it seems to us that the true criterion of damages, is that laid down by the court.

We think the instructions offered by appellant were objectionable, for the reason that they gave undue prominence to certain portions of the testimony. Besides, as the jury found that appellant was not damaged at all in the erection of the building, it does not appear that he was prejudiced by a mere error in the standard for the measurement of damages; and, after a careful consideration of the case, we are disposed to think that there was no error to appellant's prejudice in the instructions given the jury.

For reasons given, the judgment is affirmed.

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CASE 97—ACTION ON CONTRACT—JUNE 6.

Tilford, Etc. v. Dotson.

APPEAL FROM BREATHITT CIRCUIT COURT.

1. **VENUE—ACTION UNDER CONTRACT FOR TIMBER.**—An action to recover the contract price for timber cut and hauled, may be brought in any county where the defendant is served with process and the court may decree a sale of such timber as is found in that county.
2. **SAME.**—In such an action the court to enforce the plaintiff's lien may decree a sale of identified trees embraced by said contract

Tilford, &c., v. Dotson.

standing in counties other than that in which the action is brought—such trees being personalty and not realty.

3. **INTEREST—ESTIMATE OF.**—The terms of the contract fixing the liability of appellant to deliver one hundred trees every thirty days on the banks of the floating water, whether there was sufficient water to float them to the railroad or not, fixes the time for the delivery of the timber and it was proper for the lower court to make the payments bear interest upon that basis.

**STONE & SUDDUTH AND ALEX. G. BARRETT FOR APPELLANTS.**

1. The petition together with the contract filed with it shows on its face that the plaintiffs are at most entitled to recover \$3,000 only, with interest, whereas a judgment was obtained for \$13,338 with interest. The defendants were not required to pay for the logs every thirty days unless the terms upon which they were delivered would carry them to a railroad.
2. Even construing the contract as the petition interprets it, the judgment is incorrect in the matter of interest.

**JOHN C. MILLER ALSO FOR THE APPELLANT.** (Brief not in the record.)

**BECKNER & JOUETT IN A BRIEF AND SUPPLEMENTAL BRIEF FOR THE APPELLEES.**

1. The issues in this case are purely legal, the foreclosure of the lien alone requiring the action to be in equity. There applies then the rule of appellate practice, so well settled by repeated adjudications of this court, that the chancellor's finding will not be reversed unless palpably against the weight of the evidence. *Fraley v. Peters*, 12 Bush, 471; *Judge v. Braswell*, 13 Id., 73; *Williams v. Rogers*, 14 Id., 781; *Campbell v. C. S. R. R. Co.*, 9 Ky. Law Rep., 799; *Cox v. Reid*, 10 Id., 565; *Anderson v. Winfree*, 85 Ky., 613; *Bell v. Wood*, 87 Ky., 59; *Fuqua v. Fuqua*, 13 Ky. Law Rep., 130; *Davezac v. Seller*, 93 Ky., 421; *Lou, &c., Ry. Co. v. Taylor*, 96 Ky., 248.
2. The rule of construction to which all others are subordinate is to ascertain and follow the intention of the parties. *McGrath's Admr. v. Grinstead's Assignee*, 9 Ky. Law Rep., 375; *Thompson v. Thompson*, 2 B. M., 166; *Schultz v. Johnson*, 5 B. M., 499. And this intention is to be gathered from the entire instrument, not from disjointed or particular portions of it. *Smith on Contracts*, p. 542; *Parsons on Contracts*, vol. 2, p. 502; *White v. Booker*, 4 Met., 268; *Foster v. Pettibone*, 57 Am. Dec., 530; *Stewart v. Preston*, 44 Am. Dec., 621.
3. Constructions leading to absurdities, or which render portions of the contract nugatory or unreasonable should not be adopted.

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Tilford, &c., v. Dotson.

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- Sheffler v. Nadelhoffer, 23 Am. St. Rep., 626; Cravens v. Eagle Cotton Mills, 16 Id., 298; Dederick v. Wolfe, 24 Id., 283; Hughes v. Lane, 50 Am. Dec., 436; Thrall v. Newell, 47 Id., 682.
4. Unless the clear intention of the parties manifestly demands it, a contract should not be so construed as to give one of the parties an unfair or unreasonable advantage over the other. Russell v. Allerton, 108 N. Y., 288; Wilson v. Morlon, 66 Ill., 385; Royalton v. Turnpike Co., 14 Vt., 311; Beckford v. Cooper, 41 Pa. St., 142; Gale v. Dean, 20 Ill., 320; Crabtree v. Hogenbaugh, 25 Ill., 233.
  5. Contract should be construed most strongly against party who stipulates payment of debt or undertakes an obligation; in other words, where the meaning is doubtful, that construction should be adopted which is most beneficial to promisee. Evans v. Sanders, 33 Am. Dec., 297; Hoffman v. Aetna Ins. Co., 88 Am. Dec., 337; Paul v. Traveler's Ins. Co., 8 Am. St. Rep., 758; Wyatt v. Larimer, &c., Ins. Co., 36 Id., 280.
  6. A circuit court, having acquired jurisdiction of the defendant's person and the main controversy, can sell land in another county as incidental relief. Doty v. Deposit Bldg. & L. Assn., 20 Ky., Law Rep., 627; Webb v. Wright, 2 Bush, 126; Fishback v. Green, &c., 87 Ky., 107; Kaufman v. Sayre, 2 B. M., 202.
  7. Standing trees sold in contemplation of their speedy separation from the soil are personalty. Cain v. McGuire, 13 B. M., 274; Byassee v. Reese, 4 Met., 372; Cardwell v. Atwater, &c., 15 Ky. Law Rep., 572; Asher Lumber Co. v. B. F. French, 18 Ky. Law Rep., 683.
  8. The mere allegation of "no title" in vendor, unaccompanied by false representations or fraud, does not show a breach of the covenant of special warranty. Ky. Stats., sec. 493.

JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

This action was brought by appellee, Dotson, in the Breathitt circuit court, to recover of appellants \$15,000, balance alleged to be due for walnut trees sold to them, and to enforce a vendor's lien retained on the trees, logs, and lumber therefrom. Some of the logs and lumber were in Breathitt county, and personal service was had in Breathitt county.

At the time of the contract neither appellee nor appellants resided or were in Kentucky, and the trees were standing in the counties of Pike, Knott, Letcher, Perry, and Leslie.

The trees were all marked, and the written contract of sale describes them so that they may be found. The contract provides for the sale of some 2,000 trees, any loss to be deducted, at the price of ten dollars per tree. A cash consideration of \$5,000 was paid, and for the balance the contract provides: "And it is agreed and understood by and between the parties hereto that the said second parties [appellants] are to cut at the rate of one hundred trees and deliver the same on the banks of floating water every thirty days from this date, and are to float the same to some point of the railroad, and as soon as said logs can be floated and delivered to a line of railroad, they are to be paid for at the rate of ten dollars per tree for every lot of one hundred trees delivered as aforesaid; and if the second parties [appellants] shall at any time fail to cut and deliver on floating water as many as one hundred trees within every thirty days from this date, except as to the first one hundred trees to be delivered under this contract, then the said second parties are to pay the said first party at the expiration of the said thirty days the same sum as if the said hundred trees required to be delivered on floating water had been delivered on a line of railroad, unless they are prevented from so delivering by reason of the fact that the said streams will not float said logs."

This contract was made January 16, 1894, and this action was filed May 10, 1895.

It was alleged that, although all the trees had not been cut and delivered as the contract provided, yet the appellants were at fault for this not having been done, as sufficient water had been in the streams to float same as was contemplated.

There was no attachment, but the action sought a judg-

ment for the balance due, and for a decree of foreclosure of the vendor's lien on the trees and logs, giving full description.

There was a special demurrer to the jurisdiction of the Breathitt Circuit Court, which was overruled and exceptions reserved.

The answer presents the defense of no title to many of the trees, destruction of others of the trees, and a claim for rebate or deduction on that account, and a denial that there is due appellee anything according to the contract; denying that the trees had been cut and delivered, or that there was floating water sufficient to have carried them if cut and on the banks of the streams; also, pleaded several suits whereby they were prevented from removing trees embraced in the contract; also, pleaded a counterclaim for damages by reason of the fact, as alleged, that the trees in the contract are not the trees actually shown appellants before it was made, and are worth much less in value; and for this difference in value damages were sought. Upon these questions issues were formed, and much proof was taken. During the progress of the case, by an agreement, two persons were selected by the parties to take the contract, and go and find the trees called for, and measure them, and ascertain the number in existence, or that had been cut by appellants, and to report to court. These persons filed a report, and to this report exceptions were filed by appellants.

On hearing before the court, the exceptions filed to the report as to the number of trees was overruled, and the court found that the total number of trees, as embraced in the contract, including 105 supplied in lieu of others, was 1,838 trees, and gave judgment for \$18,380, less the \$5,000 cash payment; also, found that there were seventy-three

defective trees, not included in the contract, but which were cut and taken by appellants, and of the value of \$225.

In rendering judgment, interest was allowed on \$3,000 from March 13, 1896, and interest on \$1,000 from each of the months of July, August, September, October, November and December, 1894, and from January, February and March, 1895, and on the balance, \$380, from April, 1895, and on \$225 from March 13, 1896. The court also decreed a sale of the trees and logs to satisfy the judgment, and from that judgment this appeal is prosecuted.

It is seriously insisted by counsel for appellants that the Breathitt circuit court did not have jurisdiction of the action, and that the special demurrer should have been sustained.

Counsel urges that the action, being in equity to enforce a vendor's lien on standing trees, duly marked, and to be removed in the immediate future, was an action for the sale of real property under lien, and is governed by section 62, subsection 3, Civil Code, providing that such actions must be brought, except for debts of decedents, in the county in which the subject of the action, or some part thereof, is situated; that the only part of the property sought to be subjected that was in Breathitt county was the logs that had been cut and removed—personalty.

We are of opinion that the Breathitt Circuit Court, upon service of process in that county, had jurisdiction of the person of the appellants, to render a personal judgment for the amount found to be due, and to decree a sale of such logs—personalty—as were found in that county. This proposition can hardly be questioned. This would be true although it were sought to subject realty in other counties, also, to the payment of the debt.

We are also of the opinion that the court had jurisdic-



tion to decree a sale of the trees embraced in this contract standing in the counties of Leslie, Perry, Letcher, and Pike. We do not assent to the proposition that standing trees, marked and designated and sold in contemplation of immediate severance from the soil, are realty. In our opinion, these trees embraced by this contract are personalty.

In the case of *Cain v. McGuire*, 13 B. Mon., 341, and the case of *Byassee v. Reese*, 4 Metc. (Ky.), 372, [83 Am. Dec., 481], this question was expressly determined. In the latter case the court said: "The first question is whether or not a sale of standing trees is embraced by that provision of the statute of frauds which relates to contracts for the sale of land. This question has produced some conflict of opinion. But, according to the weight of authority, a sale of standing trees, in contemplation of their immediate separation from the soil by either the vendor or vendee, is a constructive severance of them, and they pass as chattels, and consequently the contract of sale is not embraced by the statute."

In the subsequent case of *Moss v. Meshew*, 8 Bush, 187, this court, construing the case of *Byassee v. Reese*, said: "The court says that a sale of standing trees, in contemplation of immediate separation from the soil, is a constructive severance of them, and they pass as chattels. As the title to trees standing upon land and sold in this way vests in the purchaser, as in the sale of any other personal chattel, this contract relied upon by the appellee as a defense must be regulated and determined by the well-established principles of law applicable to the sale and delivery of personal property."

These authorities were followed by the Superior Court in the case of *Cardwell v. Atwater*, 15 Ky. Law Rep., 570.

It may be, as counsel contends, that the weight

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Tilford, &c., v. Dotson.

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of authority outside of this State is against this view; but we consider the question well settled in this State, and we would not feel authorized to disturb this rule at this day, if we differed from the opinions above. The fact that the contract of sale is made in the form of a deed signed by appellee and wife does not change the character of the property from personalty into realty, no more than the fact that appellants did not have the contract recorded as a deed change or affect the character of the property.

From the proof and report of the two disinterested persons who went on the ground and measured the trees and counted the number, we are of opinion that the judgment of the lower court as to the number of trees embraced in the contract (1,838) is correct.

We are also of opinion from the proof that the amount found as the value of the seventy-three defective trees (\$225) is not error.

We are also of opinion that by the terms of the contract the appellants were bound to cut and deliver on the bank of floating water 100 trees every thirty days; this to be done regardless of whether there was sufficient water to float them to a railroad or not. The purchase price was not to be paid till the logs were floated to a railroad, unless these appellants delayed the floating when there was sufficient water.

The lower court, taking this view of the contract fixed the dates from which the several deferred payments of \$1,000 each should bear interest. As to these findings there is no error.

We are also of opinion that there was no failure of title as to the 1,838 trees, and the judgment of the court on this question was for the number of trees

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

actually in existence, and those theretofore cut by appellants and embraced by the contract, at the contract price of ten dollars per tree.

Finding no error, the judgment is affirmed.

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all 218

CASE 98—ACTION TO RELIEVE AGAINST FORFEITURE—JUNE 8.

Allison, Etc. v. Cocke's Executor, Etc.  
Same v. Preston's Executor, Etc.

APPEAL FROM JEFFERSON CIRCUIT COURT, LAW AND EQUITY DIVISION.

1. **EXECUTORS—POWERS OF, PRIOR TO PROBATE.**—An executory contract for the sale of land in Kentucky entered into by executors who had qualified in Virginia, but who had not caused the will under which they acted to be probated in this State, nor qualified under the statute in this State, is not void by reason of such failure, but may be ratified and become binding by a subsequent probate and qualification in this State and a tender of deeds pursuant to such contract.
2. **EXECUTORY CONTRACT—OPTION—FORFEITURE.**—An agreement entered into by two parties whereby one binds himself to purchase lands from the other at an agreed price, of which 5 per cent. was to be made on a certain date and the residue of such payment on or before another fixed date, with the stipulation that the 5 per cent. was to be forfeited if the purchaser failed to pay the residue of the cash payment on time, is an executory contract for the sale of land, and the five per cent. paid is not a mere price for an option to buy nor is it to be deemed liquidated damages for breach of the contract.
3. **SAME.**—A court of equity will relieve against a forfeiture incurred in such a case leaving the vendor to set off against the plaintiff's claim his actual damages sustained by the vendee's failure to comply with his agreement.

HELM & BRUCE FOR THE APPELLANTS.

1. One named as executor in the will of a Virginia testator, giving power of sale of land in Kentucky, has no power to make a valid contract of sale thereof, until the will has been probated and he qualified in Kentucky.
2. Such contracts, made prior to probate or qualification, are void, and

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

can not be ratified; and money paid thereunder, being without consideration, may be recovered.

3. A contract for the sale of land, or a forfeiture for failure to comply, can not be enforced by the vendor where he can not tender an unencumbered title.
4. A pure forfeiture, even in a contract otherwise valid, will not be enforced, especially where the party seeking to enforce the same fails to tender performance on his part at the time mentioned in the contract.

Citations: Gilbert v. Bartlett, 9 Bush, 54; Pryor v. Mizner, 79 Ky., 232; Marrett v. Babb, 91 Ky., 93; Patterson v. Carneal, 3 Mar., 619; Rutherford v. Clark, 4 Bush, 27; Genl. Stats., ch. 39, art. 1, secs. 5, 9, 13; Owen v. Cowan's hrs., 7 B. M., 156; Shields v. Smith, 8 Bush, 601; Gulley v. Prather, 7 Bush, 167; Warfield v. Brand, 13 Bush, 77; Brewer v. Crabb, mans. op. filed May 4, 1880; Ballou v. Talbott, 16 Mass., 461; Abbey v. Chase, 6 Bush, 56; Sheffield v. Ladue, 16 Minn., 388; s. c. 10 Am. Rep., 145; White v. Madison, 26 N. Y., 122; Ogden v. Raymond, 22 Conn., 379; s. c. 58 Am. Dec., 431; Hopkins v. Mehappy, 11 S. & R. (Pa.), 129; Bank v. Flanders, 4 N. Hamp., 239; Story on Agency (9th ed.), 204a; Woodward v. Fels, 1 Bush, 162; City of Louisville v. Henning, 1 Bush, 381; Ray, &c., v. Bank of Ky., 3 B. M., 514; Watterman on Specific Performance of Contracts, sec. 410; Cleary v. Folger, 84 Cal., 316; (s. c. 18 Am. St. Rep., 187); Mason v. Caldwell, 5 Gillman, 189; 48 Am. Dec., 330; Liggett v. Shlra, 16 Atl. Rep., 474; Wills v. Mfg. Natl. Gas Co., 18 Atl., 721; Ray v. W. P. Gas Co., 20 Atl. Rep., 1065; Hahn v. Horstman, 12 Bush, 249.

SAME COUNSEL FOR APPELLANTS IN A SUPPLEMENTAL BRIEF MADE THE FOLLOWING ADDITIONAL CITATIONS:

Railroad v. Hopkins, 87 Ky., 613; McMurtry v. Railroad, 84 Ky., 465; Taylor v. Whiting, 9 Dana, 401; Bank v. Behan, 91 Ky., 462; Wills v. Lewis, 4 Mitch., 271; Lewis v. Stafford, 4 Bibb., 318; Thompson on Contracts, secs. 28, 117A; Lawson on Contracts, sec. 350.

WILLIAM MARSHALL BULLITT FOR THE EXECUTORS OF ELIZABETH B. COCKE, &c., APPELLEES. (BULLITT & SHEILD OF COUNSEL.)

1. When a contracting person attempts to bind himself in a representative capacity, when, in fact, he has no such capacity, he is individually liable on the contract itself, and the representative words used will be construed as *descriptio personae* only. First National Bk. v. Collins, 43 Pac. Rep., 499; Pumpelly v. Phelps, 100 Am. Dec., 463; Peterson v. Homan, 44 Minn., 166; Moss v.

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

Livingston, 4 N. Y., 208; Dewitt v. Walton, 9 N. Y., 570; Boy v. Gunn, 1 Denio, 108; Bush v. Cole, 84 Am. Dec., 343; Mason v. Caldwell, 48 Am. Dec., 330.

2. One who makes a contract in the name of another, claiming to be authorized by him to do so, is personally liable to perform the contract if he had no authority to make it for the other. Wells v. Maley, 5 Ky. Law Rep., 853; Dusenberry v. Ellis, 3 Johns. Cas., 70; Palmer v. Stephens, 1 Denio, 471; Sinclair v. Field, 8 Cow., 543; Richie v. Bass, 15 La. An., 668; Keener v. Harrod, 2 Md., 63; Weare v. Grove, 44 N. H., 196; Dodd v. Bishop, 30 La. Ann., 1178; White v. Skinner, 13 Johns., 307; Mitchell v. Hazen, 4 Conn., 495; Gillaspie v. Wesson, 7 Port., 454; Collins v. Allen, 12 Wend., 356; Roberts v. Button, 14 Vt., 195; Royce v. Allen, 28 Vt., 236.
3. A contract entered into without the requisite statutory power from the State is abortive and ineffective, while the power is lacking, but upon the acquisition of power it may be ratified and fully vitalized from the beginning. In short, every so-called void contract may be validated upon elimination of the vitiating element. Morawetz on Private Corporations, sec. 651; Fritts v. Palmer, 132 U. S., 282; Whitney v. Wyman, 101 U. S., 392; New Haven, &c., Co. v. Hayden, 107 Mass., 525; Goshen v. Stonington, 10 Am. Dec., 121; Lewis v. McElwain, 16 Ohio, 347; Campbell v. Young, 9 Bush, 240; Dorsey v. Banks, 55 N. W. R., 574; Anderson v. Santa Anna, 116 U. S., 356; Graham v. Boston, &c., R. R. Co., 118 U. S., 161; White Water Valley Co. v. Vallette, 21 How., 414; Cooley's Con. Lim., p. 738, *et seq.* Also cited under the general treatment of the subject of void and voidable contracts: Bennett v. Morse, 39 Pac. Rep., 582; Raffles v. Wickelhaus, 2 H. & C., 906; Kyle v. Kavanaugh, 103 Mass., 356; Central Transp. Co. v. Pullman's Car Co., 139 U. S., 24; Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S., 1; Hess v. Werts, 4 S. & R., 356; Crolley v. Minneapolis, &c., Ry. Co., 14 Am. & Eng. R. R. Cases, 47; Hickory Farm Oil v. Buffalo, &c., R. R. Co., 32 Fed. Rep., 22; National Bank v. Matthews, 98 U. S., 621; Reynolds v. Crawfordsville Bank, 112 U. S., 405; Jones v. Habersham, 107 U. S., 174; Leazure v. Hillegas, 1 Serg. & R., 313; Goundie v. Water Co., 7 Pa. St., 233; Bone v. Canal Co., 5 Atl. Rep., 751; Chicago, &c., R. R. Co. v. Lewis, 53 Iowa, 101; Land Co. v. Bushnell, 11 Neb., 192; Barnes v. Suddard, 117 Ill., 237; Wright v. Lee, 51 N. W. R., 706; Foundry Co. v. Augustine, 31 Pac. Rep., 327; Mill Co. v. Bartlett, 54 N. W. R., 544; Whitman, &c., Co. v. Strand, 36 Pac. Rep., 682; Edison, &c., Co. v. Canadian, &c., Co., 36 Pac. Rep., 260; Kindel v. Beck, &c., Co., 35 Pac. Rep.,

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

- 538; R. R. Co. v. Evans, 66 Fed. Rep., 809; Thompson on Corporations, secs. 1, 2; Holmes' Common Law, chap. IX.
4. If one person assumes to bind another without any precedent authority whatever, that other may subsequently adopt the contract and take the benefits and liabilities of it. Such ratification relates back and is equivalent to prior authority. Lawson on Contracts, sec. 172; Bishop on Contracts, sec. 1108; Anson on Contracts, p. 337; Clark on Contract, p. 719; Forsythe v. Bonta, 5 Bush, 547; Starks v. Sikes, 8 Gray, 609; Gulick v. Grover, 97 Am. Dec., 728; Bank v. Sharp, 43 Am. Dec., 470; Everett v. U. S., 30 Am. Dec., 584; Strasser v. Conklin, 11 N. W. R., 254; Goss v. Stevens, 21 N. W. R., 549; Nesbitt v. Helser, 49 Mo., 383; Sheldon Co. v. Machine Co., 90 N. Y., 610; Clealand v. Walker, 11 Ala., 1058; McCracken v. San Francisco, 16 Cal., 591; Despatch Line v. Bellamy Co., 12 N. H., 205; Kinsley v. Norris, 60 N. H., 131; Francis v. Kerker, 85 Ill., 190; Wallace v. Lawyer, 90 Ind., 499; McDowell v. McKenzie, 65 Ga., 630; Grogan v. San Francisco, 18 Cal., 590; Burgess v. Harris, 47 Vt., 322.
  5. If a married woman contracts and performs or tenders performance she may have specific performance from the other. If she performs, the other party can not even rescind the contract upon offering to restore to her the consideration, much less can he recover his consideration without restoring hers. Neef v. Redmon, 76 Mo., 195; Walker v. Owen, 79 Mo., 563; Chamberlain v. Robertson, 31 Iowa, 408; Ham v. Boody, 51 Am. Dec., 235; Richards v. Doyle, 36 Ohio St., —; s. c. 38 Am. Rep., 550; Logan v. Bull, 78 Ky., 607; Warwick v. Lawrence, 43 N. J. Eq., 179; Wilson v. Branch, 77 Va., 65; Darraugh v. Blackford, 84 Va., 509; Warren v. Brown, 57 Am. Dec., 191.
  6. Appellants having insisted upon holding and exercising the right to assert an ownership in the property, and preventing the Cockes from using such a right, when the prospects for enormous profit were bright, can not when the speculation has failed, recover what they paid for that privilege. Mason v. Caldwell, 48 Am. Dec., 330; Twin Lick Oil Co. v. Marbury, 91 U. S., 587; Zabriskie v. The C. C. & C. R. R. Co., 23 How., 381.
- Miscellaneous: Brinegar v. Chaffin, 3 Den., 108; Telegraph Co. v. Adams, 155 U. S., 688; Ballou v. Talbott, 16 Mass., 461; Gaither v. O'Doherty, 11 Ky. Law Rep., 595; Smith v. Cansler, 83 Ky., 367; Church v. Mott, 32 Am. Dec., 613; Arthur v. Broadnax, 37 Am. Dec., 707; Bibb v. Allen, 149 U. S., 481; Taylor v. Patrick, 1 Bibb., 168; Rutherford v. Clark, 4 Bush, 27; Cohens v. Virginia, 6 Wheat., 264, 399.

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

THOMAS W. BULLITT FOR THE SAME APPELLEES. (BULLITT & SHEILD OF COUNSEL.)

1. Money paid under the advice of counsel, with a full knowledge of all the facts, and after due consideration of all the law applicable to those facts, can not be recovered on the ground that the counsel have since changed their mind as to the application of the law to the facts. *Bank v. Behan*, 91 Ky., 562; *R. R. Co. v. Hopkins*, 87 Ky., 613; *McMurtry v. R. R. Co.*, 84 Ky., 465; *Louisville v. Henning*, 1 Bush, 381; *Ray, et al, v. Bank of Kentucky*, 3 B. M., 514.
2. In the absence of fraud, duress, misrepresentation or mistake, money paid under a contract which has been fully executed upon both sides, can not be recovered, especially where the party seeking to recover can not restore to the other the consideration or replace the *status quo*. *Bishop on Contracts*, secs. 627, 630, 633; *Chestnut v. Harbaugh*, 28 Smith (Pa.), 473; *Finn v. Donohue*, 35 Conn., 216; *Uhlen v. Applegate*, 2 Casey, 140; *Green v. Godfrey*, 44 Me., 25; *Shuman v. Shuman*, 3 Casey, 90; *Kinney v. McDermott*, 55 Iowa, 674; *Goughlin v. Knowles*, 7 Met., 57; *Congdon v. Perry*, 13 Gray, 3; *Beaman v. Buck*, 9 Sm. & M., 207; *Richards v. Allen*, 17 Me., 296; *Bennett v. Phillips*, 12 Min., 326; *Marsh v. Wyckoff*, Bosw., 202; *Clencey v. Crane*, 2 Dec. Eq., 363.
3. Upon the qualification of an executor, administrator, or executor *de son tort*, his title vests as of the death of the testator; the qualification relates back to the testator's death and validates all acts performed before qualification. 7 Am. & Eng. Ency. of Law, 194; *Williams on Executors*, 363 *et seq.*, 486 *et seq.*, 557; *Crosswell on Executors*, secs. 614-617; 2 *Redfield on Wills*, 14 and note, 16; *Dearbon v. Mathes*, 128 Mass., 194; *Stagg v. Green*, 47 Mo., 500; *Dearman v. Maxfield*, 38 Ark., 631; *Wall v. Bissell*, 125 U. S., 390; *Foster v. Bates*, 12 M. & W., 226; *Brown v. Lewis*, 9 R. I., 497; *Kalckhoff v. Zaehrlaut*, 40 Wis., 427; *Hill v. Curtis*, L. R., 1 Eq., 900, 100; *Hatch v. Proctor*, 102 Mass., 351; *Vroom v. Van Horn*, 10 Paige, 549; *Magner v. Ryan*, 19 Mo., 196; *Shillaber v. Wyman*, 15 Mass., 321; *Andrew v. Gallison*, 15 Mass., 325; *Jewett v. Smith*, 12 Mass., 309; *Priest v. Watkins*, 2 Hill., 225; *Rattoon v. Ouerasker*, 8 Johns., 125; *Barnard v. Bateman*, 76 Mo., 414; *Wilson v. Wilson*, 54 Mo., 213; *Cook v. Cook*, 23 S. C., 204; *Witt v. Elmore*, 2 Ball. L. R., 595; *Lamb v. Helm*, 56 Mo., 431; *Stagg v. Stevenson*, 68 Mo., 453; *Howell v. Kirk*, 41 Mo. App., 527; *Boeger v. Langenberg*, 42 Mo. App., 12; *Spring v. Parkman*, 12 Me., 127; *Pinkham v. Grant*, 78 Me., 158; *Dorsey v. Banks*, 55 N. W. R., 574.
4. If a contract be originally void for want of legal contractual capacity in one party, it may, upon the subsequent acquisition of

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

the lacking power, be affirmed, renewed, and redelivered by mutual consent and becomes perfectly valid without an actual physical re-execution. *Campbell v. Young*, 9 Bush, 240; for full discussion and citation of authorities, see brief of William Marshall Bullitt for appellees.

5. Persons named in a will as executors, who sell real estate by virtue of a power conferred therein, act not as executors, but as the donees of a trust power. In short, they possess a duality of capacity—executors and donees of a trust power. It is in this latter aspect that they act with reference to real estate. *Crusoe v. Butler*, 36 Miss., 164; *Conklin v. Egerton*, 21 Wend., 430; *Newton v. Bronson*, 67 Am. Dec., 89; *Lewis v. McFarland*, 9 Cranch, 152; *Clay v. Hart*, 7 Dana, 1; *Warfield v. Brand*, 13 Bush, 77, 94; *Lindley v. O'Reilly*, 1 L. R. A., 79; *Brewer v. Crabb* (mans. opinion, 1880).
  6. One holding an option on real estate can not demand that an incumbrance be removed until he has declared his intention whether or not he will take the land. *Thompson v. Carpenter*, 45 Am. Dec., 181 and note; *Tiernan v. Rowland*, 15 Pa. St., 441; *Gaitther v. O'Doherty*, 11 Ky. L. R., 595; *Handly v. Tebbets*, 13 Ky. Law Rep., 280; *Smith v. Cansler*, 83 Ky., 367; *Church v. Mott*, 32 Am. Dec., 613; *Mason v. Caldwell*, 48 Am. Dec., 330.
- Miscellaneous: *Rutherford v. Clark*, 4 Bush, 33; Gen. Stat., sec. 1, art. 1, ch. 39; *Pryor v. Mizner*, 79 Ky., 232; *Shields v. Smith*, 9 Bush, 601; Gen. Stat., sec. 5, art. 1, ch. 39; Same, sec. 9; 3 Am. & Eng. Ency. of Law., 443.

RANDOLPH H. BLAIN FOR APPELLEES, PRESTON'S EXRS. (H. R. PRESTON OF COUNSEL.)

1. Money paid under mistake of law. L. R., 3d. Ch. Div., 351; *Pomeroys's Eq.*, p. 851; *Underwood v. Brockman*, 4 Dana, 309; *Ray v. Bank*, 3 B. M., 510.
2. Vendors bound individually. 5 Gill (Ill), 196, *Mason v. Jordan*; *Hood v. Barrington*, L. R. 6 Eq. Ca., 217.
3. Mutuality. *Richards v. Green*, 23 N. J. Eq., 536; *Welsh v. Whelpley*, 62 Mich., 15; *Wylson v. Dunn*, L. R. 34 Ch. Div., 569.
4. Sufficient if vendor show title at the hearing. *Kimball v. West*, 15 Wall., 377.
5. Right to rescind. *Grymes v. Sanders*, 93 U. S., 56; *Murrell v. Goodyear*, 1 De Gex, F. & J., 431.
6. Void and voidable contracts. Addison on Contracts, 92.
7. Ratification. *Long v. Long*, 62 Md., 71; *Foster v. Bates*, 10 M. & W., 226; *Boyer v. Arch*, 10 Exch., 333; *Hatch v. Procter*, 102 Mass., 351; *Brown v. Lewis*, 9 R. I., 497.
8. Powers of executor before qualifying. *Wall v. Bissell*, 125 U. S.



Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

- Rep., 382; Williams on Executors, 269; Priest v. Watkins, 2 Hill (N. Y.), 225.
9. Writings construed together. Thayer v. Luce, 22 O. St., 62.
  10. Joint contract. Story's Eq. Pl., Sec. 169; Mason v. Eldred, 6 Wall., 238.
  11. Implied dependency. Langdell's Ca. on Con., Secs. 105-6; Warvelle on Vendors, p. 123; Fry on Specific Per., p. 732; Pomeroy's Eq., p. 897.
  12. Objections must be made known. Gregg v. Von Phul, 1 Wall., 274; Kenninston v. Blakie, 121 Mass., 552; Gerrish v. Norris, 9 Cush., 167; Curtis v. Aspinwall, 114 Mass., 187.
  13. Precedent conditions must be performed. McCulloch v. Boyd, 120 Pa. St., 552; Gerrish v. Maher, 70 Ill., 140.
  14. Statute of frauds. Miller's hrs. v. Antle, 4 Bush, 407; Gill v. Hewett, 7 Bush, 10; Ide & Smith v. Stanton, 40 Am. Dec., 700; Lee v. Cherry, 4 Am. St. Rep., 800; Rowland v. Garman, 1 J. J. Mar., 76; Harrow v. Johnson, 3 Met., 578.
  15. Contract was executed. Woodbury v. Turner Day Mfg. Co., 16 Ky. Law Rep., 570.
  16. Forfeiture, penalty, &c. Pollock on Prin. of Con., 447.
  17. Vendee in default can not recover from vendor not in default. Wharton's Law of Con., vol. 2, sec. 743; Waterman on Spe. Per. of Con., 449; Bradford v. Parkhurst, 31 Am. St. Rep., 189; Haynes v. Hart, 43 Barb., 58; Ketcham v. Evertson, 7 Am. Dec., 386; Tipton v. Feltner, 20 N. Y., 428; Clarke v. Rochester, 20 N. Y., 627; Packer v. Button, 25 Vt., 193; Hansbrough v. Peak, 5 Wall., 497.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

The records on these appeals show that Mrs. Elizabeth Cocke was the owner of about 600 acres of land, and her brother Col. Preston owned about 320 acres immediately adjoining it, on the Preston-street road, south of Louisville. About two years before the contracts here involved were made, Mrs. Cocke died, a resident of Virginia, leaving a will, by which her three sons were made executors. Some six months before the making of the contracts, Col. Preston died, a resident of Virginia, leaving a will, by which his two sons were appointed executors. All of the devisees under both wills lived in Virginia or Maryland. Each will gave to the executors the power to

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

sell the land in Kentucky, for the purpose of paying debts and of making distribution of the proceeds. For some time previous to the making of the contracts, the Cocke executors had made efforts to sell the land in their hands, and had given a number of successive options thereon to agents who were endeavoring to effect sales. The Preston executors had also given options to the Cocke executors, it being supposed that the two tracts lying together could be sold as one tract to better advantage. Prior to the making of the contracts, the Cockes, controlling the sale of both tracts, had been considering a scheme to sell the land through a projected land and improvement company, but the corporation was never formed, and little or no progress appears to have been made in putting the scheme into operation, except that some persons had verbally agreed to take stock in the corporation when formed. The agent of the Cocke executors in Louisville was Mr. John A. Stratton, and appellant Fawcett was acting with him in the effort to dispose of the land.

With a view of effecting a sale of the land through a syndicate, appellants Fawcett and Allison arranged a meeting with the executors of both wills, at Richmond, Va., on February 12, 1891. After considerable negotiations as to the price to be paid for the land, an agreement was finally reached; the Preston executors being induced to agree to the price fixed upon by a side agreement of the Cocke executors to pay them \$2,500 for making the contract. The contracts, which were written upon the same paper,—the Cocke contract being first, and referred to in the Preston contract,—are as follows:

"This agreement, made this 12th day of February, 1891, between F. H. Allison and J. C. Fawcett, of Louisville, Kentucky, parties of the first part, and T. P. L. Cocke, Edmund

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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R. Cocke, and Preston Cocke, executors of Mrs. Eliza R. Cocke, deceased of the State of Virginia, parties of the second part, witness as follows, to wit:

The said Allison & Fawcett hereby agree to purchase from said Cocke's executors the following real estate, located in the county of Jefferson, Kentucky, to wit, a tract of land containing 609 acres, more or less, bounded on the south by Bickel's lane, on the west by the Preston street turnpike, on the east by the Poplar Level road, and on the north by a line common to Cocke and Preston, which was established by deed of partition between said Cocke and Preston dated May, 1836, by deed recorded in the Jefferson county clerk's office, Kentucky, D. B. S. S., p. 494, except 3,724 acres sold to H. Bickel, by deed of February 14, 1873, for the sum of two hundred and fifty thousand dollars (\$250,000), to be paid as follows, one-fourth cash, and the balance on or before one, two, and three years, with interest at six per cent. per annum from date till paid; said deferred payments to be secured by deed of trust on said land. The said Allison & Fawcett hereby agree to pay five per cent. of said cash payment, said five per cent. amounting to the sum of twelve thousand five hundred dollars, on or before the first day of March, 1891; and they agree further to pay the residue of said cash payment, with six per cent. interest thereon from date till paid, on or before the first day of May, 1891.

"The said Allison & Fawcett hereby also agree that, in the event that they do not pay the residue of said cash payment by May 1, 1891, then said sum of twelve thousand five hundred dollars, paid by them on or before the first day of March, 1891, shall be wholly forfeited to said Cocke's executors, without recourse on the part of said Allison & Fawcett.

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

"And said Cocke's executors hereby agree that, in the event that the residue of said cash payment is paid on or before May 1, 1891, and the notes for the deferred payments and said deed of trust are executed and delivered to them, then they will convey said tract of land to Allison & Fawcett, or their assigns, by good and sufficient deed of conveyance, with general warranty.

"It is further agreed by said parties of the first and second parts that, in the event that the residue of said cash payment is not paid on or before May 1, 1891, then this contract to be null and void and of no effect, except as to the payment of the said twelve thousand five hundred dollars to said Cocke's executors by said Allison & Fawcett. Witness the following signatures: [Signed] F. H. Allison. J. C. Fawcett. Edmund R. Cocke, Preston Cocke, Executors of Mrs. Elizabeth R. Cocke. T. P. L. Cocke, by Preston Cocke."

"We, F. H. Allison and J. C. Fawcett, hereby agree to purchase the land belonging to the estate of J. T. L. Preston, deceased, adjoining the Cocke land on the north, containing three hundred and twenty acres, more or less, for the sum of one hundred and sixty thousand dollars (\$160,000), payable in the same manner as the purchase price of said Cocke's land.

"And we also agree to make a deposit of five per cent. on said purchase price before the first day of March, 1891, which is to be wholly forfeited to said J. T. L. Preston's estate in the event that the residue of said cash payment is not paid on or before May 1, 1891.

"And we, T. L. Preston and Herbert R. Preston, executors of said J. T. L. Preston, deceased, hereby agree to convey said property in accordance with the provisions of the above contracts for the conveyance of said Cocke's land.

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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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"And all of said parties hereby agree that all the provisions in the above contract with said Cockes shall be treated and considered as a part of this contract, except as to the area of tract sold and amount of purchase money to be paid. Witness the following signatures:

"T. L. Preston and Herbert R. Preston, Executors of J. T. L. Preston. Witness as to Herbert R. Preston: Luke Royd."

Before the date at which the five per cent. cash payments were to be made, one of the Preston executors wrote Mr. Helm Bruce to employ him to represent the estate in the settlement of the matter, informing him at the same time that the Preston will had not been probated nor the executors qualified in this State. Mr. Bruce replied that he had been employed by Fawcett on behalf of the other side; that his clients would be ready to pay the money, but expected the will to be probated and the executors qualified before payment was made, referring to the statute in that behalf; and suggesting that appellants were willing to pay the money to his (Bruce's) firm as trustees, to be paid over when the will was probated and the executors had qualified, or that the time of making the payment might be extended until the probate and qualification.

The payment of \$12,500 to the Cocke executors was made to Stratton, as their agent, on February 28, 1891, and \$8,000 was paid to Helm Bruce as trustee, to be paid over to the Prestons when the Preston will should be probated and the executors qualified. The Cocke will had been already probated, though the executors had not qualified in this State. Some question is made of whether the latter fact was known to appellants, but we do not regard that as very material. They did qualify on March 23, 1891, and the Preston executors probated

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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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their will and qualified on April 1st, when Bruce paid over to them the \$8,000 held by him as trustee. A deed was prepared for the Cockes by their agent, Stratton, the form of which was objected to by them, and by mutual consent, at whose suggestion is immaterial, deeds were prepared for both the Cockes and the Prestons by appellants' attorneys, and forwarded to Virginia. On May 1st, the remainder of the cash payments was to be paid,—\$50,000 to the Cockes and \$32,000 to the Prestons. The Preston deed had gone astray in the mail, and the time for its tender was extended to June 1st. The Cocke deed was tendered on that date, and refused by appellants; the ground of refusal being stated to be that there was a mortgage of \$12,000 upon about 100 acres of the tract lying next to the pike, due about eighteen months thereafter, and with no privilege of payment before maturity. The Cocke executors thereupon declared the whole transaction closed, declared a forfeiture of the \$12,500 previously paid, and, in order to effect a sale to other parties, gave an option upon the land to others. The Prestons did not make tender of their deed until August 11th, when they offered to waive the forfeiture if appellants would immediately pay the remainder of the cash payment on the purchase price.

It is unnecessary to go over the discussions with regard to the mortgage upon the Cocke property, or the evidence in regard to it, further than to say that it is perfectly evident that the existence of this mortgage was not the real reason for appellant's failure to complete their cash payment, and had no effect whatever upon their action in this behalf. The reason they declined to make the payment was their inability to raise the money. The existence of the mortgage was a mere excuse, offered by them at the time, and which, under the circumstances of this case, we

do not consider a valid one. The mortgage seems to have been discussed prior to that date, was known to appellants, who made no objection, and, had they been in any position to comply with the contract on May 1st, was rather an advantage to them. At all events, it was not regarded by them as an objection, and we think they had waived whatever excuse its existence might have otherwise afforded.

There was some attempted negotiation looking to an adjustment of the controversies between appellants and appellees, which resulted in nothing. Appellants then brought these two suits, alleging, in substance, that the Cockes were not able to make a clear title; that appellants could not use the property with the mortgage upon it; and that the Cockes had no right to insist on the performance of the contract, or to forfeit the sum already paid, when they could not themselves comply. As to the Prestons, it was claimed that the purchase of both of the tracts was practically one transaction, their property not being available without the Cocke property, and that it would be inequitable to permit the Prestons to forfeit the \$8,000 paid them on the supposition that both tracts could be acquired, when it proved impossible to obtain a clear title to the Cocke property. As we have said, we do not regard this contention as tenable.

The main contention is that the contracts for the sale of Kentucky lands were made, and purported to be made, solely by virtue of powers of sale to appellees as executors, —in one case under a will which had never been probated in Kentucky, and in both cases under wills as executors of which they had not qualified in Kentucky; that the contracts were absolutely void, and not susceptible of ratification, and the money paid on them was paid without

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

consideration, and should be returned. It is further contended that the retention of the \$20,500 was a plain and simple forfeiture, whereby appellees seek to regain this large sum of money for which nothing was given.

The learned chancellor below, in a brief opinion, held that the contract was fully executed, without fraud, misrepresentation, duress, or mistake of law or fact, and was unimpeachable. He further held that it was not necessary to a valid execution of the powers under the wills that the persons named as executors, who were also donees of the powers, should qualify as executors in Kentucky, but that they possessed a duality of capacity,—executors and donees of the trust power; and, while it was necessary to a valid performance of any of their executorial duties in Kentucky that they should qualify, it was not so as to the trust power.

Were the contracts void for want of capacity to their execution, or were they merely voidable, so that the subsequent acquirement of capacity related back to and validated their original execution, if they were not repudiated in the meantime? We shall consider this question without reference to the proposition that, under the wills in question, the executors possessed a duality of capacity which enabled them, as donees of the power, to enter into a valid contract for the sale of the lands, without qualification as executors in Kentucky.

It is conceded that, at common law, the person named in the will as executor was considered to derive his power from the will, and not from the order of probate, which was deemed merely to be conclusive evidence of his authority, but not its source. If he acted in an executorial capacity, and the will was subsequently probated, the probate was conclusive evidence, his precedent act as executor was valid.



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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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As said in *Gilbert v. Bartlett*, 9 Bush, 54, (under the Revised Statutes):

"At common law, the powers of an executor were derived from his appointment by the deviser and not from the probate of the will. Almost any act belonging to such an office could be exercised by the executor before the probate, except to sue and defend."

The Kentucky Statutes have, from time to time, made changes in the common law as to executors, though it seems clear, under the Revised Statutes, the executor was regarded as deriving his power from the will. General Statutes, c. 39, section 1, provided:

"The person named in a will as executor of it shall not act as such *to any extent* until the will, or an authenticated copy of it, is admitted to record, and he has executed bond and taken the oath required by law, in the court in which the record is made; but he may provide for the burial of the testator, pay the reasonable funeral expenses, and take care of and preserve the estate."

The words "to any extent" were here first inserted into the statute.

It is claimed that this provision of the statute makes every act of an executor for which he would be responsible on his executorial bond absolutely void and incapable of ratification, if done before probate and qualification.

*Pryor v. Mizner*, 79 Ky., 232, cited by appellants, and *Marrett v. Babb's Ex'r*, 91 Ky., 93, [15 S. W., 4], do not sustain this proposition. The former case was as to the right of an executor to appeal from a judgment refusing probate of the will under which he was appointed, and it was held that he had such inter-

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

est as gave him, the right. The only question decided in the latter case was that qualification as executor in a sister State did not authorize the executor to administer assets here or act in our courts as such representative.

Nor does the case of *Rutherford v. Clark*, 4 Bush, 27, seem to us to settle the question. In that case a foreign administrator made a contract of sale of lands in Kentucky, agreeing to convey the legal title whenever he should satisfy the vendees that the sale was necessary for the payment of debts. Ten years later, after probate and qualification in Kentucky, he conveyed the land. A suit was brought to set aside this conveyance, on the ground that the sale was not made for debt, and *was* made by a fraudulent combination with the vendees. The sale was set aside upon the ground that the consideration was so glaringly inadequate as to amount to constructive fraud. The court there said, it is true, that the executory contract of sale was void for want of authority to sell the land in Kentucky, "and, as a void sale could not be confirmed, the conveyance was the first and only valid sale; and not only the possession, but the adequacy of the consideration, must be tested by that as the only contract of sale which passed any right, or can be judicially recognized for any purpose." But in that case the sole authority of the administrator was by reason of his appointment as such in another State. The decedent's will had not been probated in Kentucky. His power to sell depended solely upon the failure of personal assets to pay debts, and was held to be a peremptory, and in no sense a discretionary power. Whether any attempt at ratification of the original contract was made before the probate, and while the administrator's incapacity to act in Kentucky continued, does not appear. The sale was abortive, not

only because of a failure to probate the will and qualify in Kentucky, but also because of the non-existence of the facts necessary to authorize a sale at all. It may be that the record presented an attempted ratification. But, be that as it may, the question presented was as to the validity of the deed. That alone was under consideration. And as said by Chief Justice Marshall in *Cohens v. Virginia*, 6 Wheat, 264:

"It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."

Assuming that the Kentucky statute, by its requirement of a bond from an executor or administrator with the will annexed to well and truly administer, not only the goods, chattels, credits, and effects that may come to his hands, but also "the proceeds of any sale, and the rents and profits of any estate, which may come to his hands, or any one for him, by color of his office, *which the will empowers him to sell*," etc., converts a power of sale, such as those under which appellees in these cases acted, into a strictly executorial power, we are still of opinion that the statute forbidding an executor to act as such, until after probate and qualification, does not abrogate what we conceive to be the general rule, that a subsequent probate and qualification will relate back to and validate acts done prior to the qualification, "which came within the scope of rightful executors' or administrators' authority, and which were in their nature benefiting to the estate, or, at least, such as other persons had no reason to complain of." 7 Am. & Eng. Enc. Law, tit. "Executors."

Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

In Williams on Executors, p. 557, the rule is thus stated:

"So where goods have been sold after the death of the intestate, and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee *in assumpsit* for goods sold and delivered; and accordingly it should seem that whenever any one, acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so the administrator may sue upon it as made to himself."

In Hatch v. Proctor, 102 Mass. 351, the court said:

"By the law of this State, as laid down by Hoar, J., in Alvord v. Marsh, 12 Allen, 603, the letters of administration, by operation of law, make valid all acts of the administrator in settlement of the estate from the time of the death. They become, by relation, lawful acts of administration, for which he must account. And this liability to account involves a validity in his acts which is a protection to those who have dealt with him."

In Vroom v. Van Horne, 10 Paige, 549, [42 Am. Dec., 94], Chancellor Walworth says:

"The grant of administration has relation to the death of the intestate, and it legalizes all intermediate acts of the administrator."

It has even been held that probate and qualification before judgment would validate the institution and prosecution of a suit. Dearborn v. Mathes, 128 Mass., 194.

It is hardly necessary to multiply authorities upon this subject. Under statutes similar in effect to ours, the doctrine has been laid down that,

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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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while the executor's powers before qualification are limited to the burial of the testator and the preservation of his estate, nevertheless his acts, within the proper scope of executorial authority, will be legalized by relation back, upon subsequent probate and qualification. This seems to be the rule in Missouri, Arkansas, Indiana, Maine, and Iowa. The underlying reason would seem to be that such statutory provisions are for the benefit of the estate of the decedent; and, while the other contracting party to such a contract might, before qualification of the executor, repudiate the contract, lack of qualification at the date of the contract affords no ground for such repudiation, if the qualification takes place before performance is demanded.

We conclude, therefore, that the contracts were valid during the month of April, 1891, and were undoubtedly so regarded and treated by both parties thereto; appellants claiming the right to control the land and appellees recognizing their right to do so.

The next question necessary to be decided is whether the contracts for the sale of land were mere options.

It is most earnestly contended on behalf of appellees that while, in form, contracts for the sale of the land, they were in reality mere options, and that the provision for the forfeiture of the five per cent. cash payments was merely a mode of expressing the consideration agreed to be paid for an option for the purchase of the property from February 12th to May 1st, which was to be treated as a part of the purchase-money in case appellants elected to take advantage of their option.

In our opinion, all the circumstances of the case combine to show that such was not the intention. Undoubtedly, appellants did not expect to put up

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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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all the money themselves. But it is equally beyond doubt that they believed their arrangements to raise the money were certain to be successful, and that they were buying the property, and not paying \$20,500 for a mere option to buy, given for a little over two months and a half. This view is strengthened by the fact that the vendors had given numerous options previous to this transaction, without any payment therefor, for as high as four months at a time, without any consideration except the hope of effecting a sale of the property. The language of the contracts is not apt for the creation of an option. It is apt—and it was drawn under the supervision of men skilled in the law—to express a contract for the sale of land. Circumstances far stronger than any shown by appellees should appear to justify us in wresting the language from its natural and obvious meaning.

It remains to be considered whether the forfeiture clause is such a forfeiture as equity will relieve against. The general rule seems to be conceded that equity will not enforce a forfeiture, but will relieve against it. But it is insisted that these contracts were fully executed on both sides; that the appellants received and retained the consideration for the five per cent. cash payments; that it is impossible for them to return the consideration or restore the *status quo*; and, under such circumstances, money paid, even under a void contract, can not be recovered.

In the application of the authorities cited and the argument adduced to the cases at bar there seems to be some confusion. Had these been options, it may be conceded that, though the price paid for them was excessive, the contract for the option being separable from the other contract, the money paid could not be recovered.

But having reached the conclusion that these were not mere contracts for options, setting forth the terms upon which the options might be exercised, but contracts for sales of land, did the declaration of a forfeiture separate that part of the contract from the remainder?

We have executory contracts for the sale of lands providing for a small cash payment, which was to be forfeited for non-compliance with the other provisions of the contracts. This provision of forfeiture, and that the contract should be void for non-payment of the remainder of the cash payment agreed upon, was not, in our view, inserted for the benefit of appellants, but for that of appellees. Appellants could not take advantage of it. To hold that they could do so would be to authorize them to take advantage of their own wrong, and, by failing to comply with one provision of the contract they had executed, release themselves from the remaining provisions. On the other hand, appellees had the right either to sue for the enforcement of the contract, or to declare it annulled for non-performance. Appellees, having this right secured to them to declare the contract at an end, availed themselves of their privilege. That they did so made the payment none the less a payment upon the original contract, and none the less a penalty, unless it can be construed to be an amount fixed as liquidated damages. It did not change the original contracts into mere executed contracts for options.

Whenever the conclusion is reached that these contracts were not options, but contracts for sale, with provisions for the forfeiture of the first payment for failure to make subsequent payments, the contention of appellees that they were executed contracts must fail; for, other-

wise, the power of a court of equity to relieve against a forfeiture would be made to depend upon the situs of the thing forfeited, and, if the penalty had already been paid when the forfeiture was declared, no relief could be afforded. The cases, therefore, cited upon this question cannot apply.

Was this a forfeiture, or was it an agreement for liquidated damages? The contract itself expressly denominates it a forfeiture. It is true that "the words 'liquidated damages' or 'penalty' are not conclusive as to the character of the sum stipulated to be paid, which must be determined from the matter of the agreement." (Pollock on Prin. of Con., 447.)

As stated in Sedgwick on Damages, (p. 250, n.): "First, the language of the agreement is not conclusive; second, the court endeavors to get at the true intent of the parties; third, it seeks to do justice between them." In following these canons of construction, it very frequently occurs that a stipulation for liquidated damages is held to be a penalty; and, on the other hand, it is not often that a stipulation for a penalty or a forfeiture is construed by the courts to be one for liquidated damages, for the reason that, as a rule, such stipulation, being inserted at the suggestion of the party to be benefited thereby, is expressed in language effective to make the stipulation operate for his benefit, so far as language can be made to do so. After careful consideration of the terms of these contracts, we are of opinion that the true intent of the parties was stated by the language used, and that the part of the cash payment first to be paid over was agreed to be and was a penalty for the non-payment of the second. The amount fixed, the circumstances, and the language used all point to this conclusion.



Upon this question the case of *Woodbury v. Turner, Day & Woolworth Mfg. Co.*, 96 Ky., 461, [29 S. W., 295], is relied on by appellees. In that case an effort was made to effect the purchase of all the ax-handle factories in this country, and combine them all in one concern. A contract was made for the purchase of appellee's plant. Twenty-five thousand dollars was deposited with a trust company as a guaranty for the performance of the contract by the purchaser, and it was provided that, in the event of his failure to complete the contract, that sum was to be paid by the trust company to the vendor, "by whom it is to be received in full satisfaction of all claims against said party of the second part, or his assigns for any damages arising from such breach of contract," with a proviso that, in the event of the completion of the contract, it was to be deducted from the purchase-money agreed to be paid. Under the peculiar circumstances of that case, this stipulation was held not to provide for a penalty, but for liquidated damages, and the ruling was based in the opinion upon the fact that the limit of damages to be recovered by the vendor was fixed at \$25,000; that the contract was for the sale of a going concern, valued at from \$350,000 to \$375,000, with an average annual output amounting to some \$350,000; and that "this vast business was put into the hands of the manager of a rival enterprise, and its extent and detail laid open to his inspection, yet in no state of case, as we understand the contract, could the appellee recover a greater sum in damages to their business for the risks incurred than the sum of twenty-five thousand dollars. It was there held that, "if the appellee had instituted its suit for specific performance, the answer would have been that the contract had already

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Allison, &c., v. Cocke's Exr., &c. Same v. Preston's Exr., &c.

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been performed, because it provides that, if the sale is not consummated, the sum of twenty-five thousand dollars already paid to the seller is to be the price of that failure." Not so in the case at bar. Here, as we have seen, the vendor had the option either to bring suit for specific performance, or rescind the contract and rely upon the provision for a forfeiture.

In the Woodbury case the court, through Judge Hazelrigg, said: "It can not be said that the sum paid is so excessive in amount, as liquidated damages, when the nature of the transaction is considered in all its parts, *and the impossibility of estimating the damages to defendant by reason of the default of plaintiff, by any known rule of law*, is fully considered, as to require the court to disregard the terms of the contract in order to relieve plaintiff from a hardship."

That case is not in the same class as the cases at bar. In these cases it would seem that the amount of damage inflicted by the non-performance of the contract on the part of appellants should be readily ascertainable. The general rule which we think applicable in such cases is thus stated in *Bradford v. Parkhurst*, 31 Am. St. R., 189, [30 Pac., 1106]:

"When a contract of sale and purchase of lands is abandoned or rescinded by the parties, the vendee, though in fault, may recover back installments paid for the purchase money, less the actual damage to the vendor occasioned by his breach of the contract."

We do not deny that, as said in *Eastman v. Plumer*, 46 N. H., 464, "when the circumstances justify the belief that his intention was to perform the contract only in case it suited his interest, he will forfeit all claim to equitable relief." But here ap-

pellants were not only willing, but anxious, to perform the contract. Nothing prevented their so doing but absolute inability.

We are of opinion, therefore, that a court of equity should relieve against the penalties sought to be enforced under these contracts, and compel the restitution of the purchase money paid, less the actual damage to the vendors occasioned by the breach.

It is objected that this particular relief was not sought by the pleading. The recovery of the specific amounts paid is expressly prayed for in the petitions, and it is averred that appellees claim those amounts were forfeited to them as penalties. There are also prayers for general relief. Under these prayers and averments, we think the relief sought can be granted in these actions. The question of the granting of this relief has been fully argued on both sides.

But, as to the question of damages, we are not inclined to take the roseate view contended for by counsel for appellants, that the amount is limited to the expenses incurred by the executors in coming from Virginia to qualify. They are entitled to deduct whatever amount they can show they have been damaged by the breach of what is conceded to have been an advantageous contract.

For the reasons given the judgments are reversed, and the causes remanded, with directions for further proceedings consistent herewith.

## Clay City National Bank v. Conlee.

CASE 99—ACTION ON CHECK—JUNE 9.

## Clay City National Bank v. Conlee.

APPEAL FROM POWELL CIRCUIT COURT.

**BANKS—SENDING MONEY BY MAIL.**—It is the duty of a bank to which a check has been transmitted by mail with directions to send cash for same, to send the money by registered and not by ordinary mail; and when the money is lost by reason of such failure the bank is liable.

**JOHN D. ATKINSON FOR THE APPELLANT.**

1. The amended reply was a departure from the original cause of action and should not have been permitted to be filed.
2. The agreement of the bank is to pay its depositors at its banking house and not elsewhere. *Branch v. Dotson*, 33 Minne., 399.
3. In the absence of special directions as to how money should be transmitted the bank had the right to use any proper means to effect the object. 1 Am. & Eng. Ency. of Law, 353 and notes, 355; Same, vol. 5, 573, 574; 3 Dana, 205; 10 Bush, 344; 5 Dana, 173.
4. There is no evidence in the record of the fact that the money mailed by the bank never reached its destination.
5. It was not actionable negligence to send the money by ordinary mail. 16 Am. & Eng. Ency. of Law, 428, 433; *Milwaukee, &c., R. R. Co. v. Kellog*, 94 U. S., 469.
6. There is no evidence of negligence on its part contributing to the loss of the money. 16 Am. & Eng. Ency. of Law, 466, and references.

**J. J. C. BACH AND W. S. PRYOR FOR APPELLEE.**

1. The amended reply was not a departure from the original cause of action; it was merely a plea in avoidance of the defense stated in the answer. Pleading in the alternative is admissible. Civil Code, sec. 113.
2. The evidence shows that the appellee did not receive the money. He swore to the fact, produced appellant's letter to the company that the money had been sent by registered mail and proved by the postmaster that this had not been done.

**JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.**

Cole & Rigsby had money deposited to their credit in the appellant bank, and they drew a check on it for \$100;

and the appellee, Conlee, was the holder of it. The bank was located at Clay City, Powell county, Ky.; and the appellee seems to have lived at Swampton, Magoffin county, Ky. He wrote the appellant, and inclosed the check, with directions to send him cash for same; and, having failed to receive it, he sued the bank, alleging that it was indebted to him on account of its failure to send him the money.

The bank filed an answer, in which it admitted that it had received the check, and averred that "it mailed to him, at Swampton, Ky., the amount of said check, in currency, by placing same in an envelope addressed to John Conlee, Swampton, Magoffin county, Ky., and putting the necessary amount of stamps on same and placing same in the mail box of the postoffice at Clay City, Ky."

It will be observed that it is not averred in the answer that the envelope containing the money was sent as a registered package. The plaintiff replied to the effect that, if the money was sent at all it was not by registered package. Subsequently the plaintiff filed an amended reply, in which he stated the defendant either did not mail to him the money as averred in the answer, or, if it did do so in the manner claimed in the answer, it neglected to send the same by registered letter; that one of these statements was true, but he did not know which one.

Under section 113, Civil Code of Practice, it was proper to plead in the alternative, as was done in this case, provided the amended reply was not a departure from the original cause of action. A departure in a subsequent pleading is not permissible at common law; neither is it under our Code of Practice. The cause of action here was the alleged failure to pay the money on the check. The

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Clay City National Bank v. Conlee.

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plaintiff did not present the check for payment in person, but requested the money to be sent to him; and the defendant neglected to do so. In order to constitute a payment to the plaintiff, it was necessary that the bank should have selected, in the absence of the instructions, the usual agency for the transmission of money to the point where the plaintiff directed it to be sent. There is no question in this case but that the proper method was to send it by registered package. The bank does not claim that it handed the package to the postoffice official in Clay City, and requested him to register it, but claims in evidence that it was deposited in the postoffice box, and that it notified the assistant postmistress that there was a package, in the bundle of letters which it deposited, to be registered. This is denied by the assistant postmistress. The testimony in the case shows that there was no record of the registration of the package.

We are of the opinion that it was the duty of the bank to have delivered the package to the postoffice, and have taken a receipt for it. If a receipt had been taken, then there would have been no difficulty in showing that the package was actually deposited in the postoffice. The taking of a receipt for the package was as much its duty as to have deposited the money; and its failure to do so appears to have been the proximate cause of the loss, if the money was deposited there as claimed by the bank. If a receipt had been taken, then the postmaster would have been compelled to show that he delivered the money to the carrier whose duty it was to take it to the next postoffice, where a record would have been made of it. In the first place, we do not think the evidence of the defendant was sufficient to exonerate it from liability to the plaintiff for the amount of the check.

Besides, the answer presented no defense. The bank did not pay the money by simply placing the money in an envelope, putting necessary stamps on it, addressing it to plaintiff, and depositing it in the postoffice. It is not even alleged in the answer that a stamp was put on it which entitled it to go as a registered package. The pleader might have considered ordinary postage stamps necessary stamps. Even if the amended reply could be adjudged to be a departure from the original cause of action, the bank was not prejudiced thereby. If the bank had delivered the money to the postmaster or his assistant at Clay City, and taken a receipt therefor, it could not be held liable in case the money had failed to reach the plaintiff.

The judgment is affirmed.

CASE 100—ACTION FOR DAMAGES FOR TRESPASS—JUNE 9.

Bridges, Etc. v. McAllister.

APPEAL FROM DAVIESS CIRCUIT COURT.

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1. **JUDGMENTS—ESTOPPEL.**—An unsuperseded judgment requiring the filling up of a drainage ditch is binding on the parties and privies to same as long as it remains unreversed, and an action for damages will not lie for flooding plaintiff's premises against one who fills up the ditch in obedience to the judgment prior to the reversal of same.
2. **SAME—PRIVIES.**—A person who employs an agent to act for him in the performance of an act for which the agent is enjoined is a privy to the judgment rendered in the action against the agent, and is bound by the judgment as long as the same is unreversed.
3. **SAME.**—Parties not bound by former appeal as to matters not in issue. The fact that appellee was privy to the former judgment not being before the court on a former appeal it was proper to permit that fact to be set up by amendment.

Bridges, &c., v. McAllister.

GEORGE W. JOLLY AND HORACE JOLLY FOR APPELLANTS.

1. A judgment, though subsequently reversed for error, furnishes full protection for all acts done under it in enforcing it, prior to its reversal. Freeman on Judgments, secs. 482, 104b; Black on Judgments, secs. 355, 170; Simpson v. Hornbeck, 3 Lansing, 53; Clark v. Pinney, 6 Cowen, 297; Allen v. Huntington, 16 Am. Dec., 702; Kaye v. Kean, 18 B. M., 847; Clark v. Rhodes, 12 Bush, 16.
2. Judgments are conclusive on not only the parties to the record but also on all who are in privity, and on the master where the servant is sued, and on the principal where the agent is sued, if the master or principal had notice of the pendency of the suit. Emery v. Fowler, 39 Maine, 326; s. c. 63 Am. Dec., 627, and cases cited; Hill v. Blaine, 15 Rhode Island, 75; s. c. 2 Am. St. Rep., 873, and cases cited; Herman on Estoppel and Res Adjudicata, secs. 150, 152; Freeman on Judgments, secs. 174, 175; Schmitt v. Ry. Co., 99 Ky., 143; s. c. 18 Ky. Law Rep., 65; Castle v. Noyes, 14 N. Y., 329; Alexander v. Tyler, 4 Denio, 302; Jackson v. Griswold, 4 Hill, 522; Robbins v. Chicago, 4 Wallace, 672; Blainsdale v. Babcock, 1 Johnson, 519; LeNeve v. LeNeve, 2 Ldg. Cases, Eq., 160, note; Ellis v. Sheffield Gas Co., 12 E. & B., 169.
3. A plea that the matters involved in the suit had been, for a valuable consideration, before the suit was commenced, compromised and settled between the parties to the suit, is a good defense to the action.
4. There was no evidence to support the verdict and peremptory instruction should have been given, because the plaintiff's own evidence proved he was not in possession of the crops; that the crops belonged to his tenants none of whom were parties to the suit. Chicago, &c., Ry. Co. v. Linard, 94 Ind., 319; s. c. 48 Am. Rep., 161; Bridges v. Dill and others, 97 N. C., 222; s. c. 1 S. E. R., 767. The measure of damages for destruction to growing crops is not the rental value of the land, but the value of the crops at the time of their destruction. Sedgwick on Damages (18th ed.), secs. 937, 434, 435 and cases cited, especially Sabine R. R. Co. v. Smith, 73 Tex., 1; s. c. 11 S. W. R., 123; Byrne v. Railway Co., 38 Minn., 212; s. c. 8 Am. St. Rep., 669.
5. The circuit court should have granted a new trial on the ground that the verdict was not sustained by sufficient evidence, or, because contrary to law. Civil Code, sec. 340, sub-sec. 6.

R. G. HILL ON THE SAME SIDE.

1. The judgment pleaded herein is a bar to appellee's cause of action and appellee was a privy to the case in which the judgment was



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Bridges, &c., v. McAllister.

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rendered and the court erred in refusing to allow the amended answers of October 16, 1894, and November 1, 1897, to be filed.

2. The judgment should be reversed because the court refused to allow the amended answer tendered on October 26, 1897, to be filed, pleading an adjustment and settlement of all damages growing out of the complaint laid in the petition.
3. The instructions offered by appellants should not have been refused, and those given are misleading and leave nothing to the jury but to fix the damages.

Citations: Herman on Estoppel and Res Adjudicata, vol. 1, secs. 150, 151, 152, 153, 154, 155 and 156, and authorities cited; 4 Dana, 136; 5 Dana, 193; 1 B. M., 29; 14 B. M., 40; 96 Ky., 640.

**SWEENEY, ELLIS & SWEENEY AND WALKER & SLACK FOR THE APPELLEE.**

Counsel discussed *seriatim* the points made in the brief of G. W. and Horace Jolly, and upon same made the following citations:

McCallister v. Bridges, &c., 15 Ky. Law Rep., 92; Same v. Same, 19 Ky. Law Rep., 109; 12 Am. & Eng. Ency. of Law., 125; Ky. Stats., Courts, sixth district, 444.

**SWEENEY, ELLIS & SWEENEY FOR APPELLEE IN A PETITION FOR A REHEARING.**

1. The question whether the record in the Miller-Hayden case had been improperly admitted as evidence before the jury was considered on the first appeal and that question is *res adjudicata*.
2. The former opinion is conclusive upon this court upon all points covered by it. Merrideth v. Clark, Sneed, 189; Kennedy v. Merridith, 4 Mon., 410; Mason v. Mason, 5 Bush, 193; LeGrand v. Baker, 6 Mon., 243; Smith v. Brannin, 79 Ky., 114. And this principle is applicable to all points which should have been presented. Davis v. McCorkle, 14 Bush, 746.

**JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.**

Appellants and appellee own neighboring farms. Between their lands there was a ridge, which prevented the water falling on appellee's land from flowing down naturally over appellants' land. Both farms lie in a very level section, where there is difficulty about drainage. Some years ago the owners of the land above the ridge, and some of those below, united in an undertaking to cut a ditch in a southerly direction, through the ridge, to Panther creek,

for the purpose of draining all their land. The ditch was cut through the ridge, but, for want of means to complete it, there stopped. The result of this was that the lands above the ridge were drained and the lands below were flooded by water that did not by nature flow upon them. The work on the ditch was abandoned. It caved in. Trees and other things fell in it, until in many places it was nearly filled up. The owners of land above the ridge after some years employed William Miller to clean it out, and, he having begun to do so, appellants and others, owning land below the ridge, filed suit against him for the purpose of enjoining him from cleaning out the ditch. On the hearing of this case the circuit court entered a mandatory order requiring the ditch to be filled up so that no water could pass over the ridge that did not flow over it naturally. On appeal from this judgment to this court it was held that the injunction should have prohibited the appellant from cleaning out the ditch, or from reconstructing it in any way so as to increase the flow of water on the land below it, and that it was error to require the ditch to be filled up. See *Miller v. Hayden*, 91 Ky., 215, [15 S. W., 243]. On the return of the cause a judgment was entered in that action pursuant to the mandate of this court. This was something over two years after the entry of the original judgment requiring the ditch to be filled up. There had been no *supersedeas* of that judgment, and, in obedience to it, the ditch had been filled up as therein required. By reason of the filling up of the ditch under the judgment, the water which had passed through it from appellee's land could no longer escape in this way, and was thrown back on it. After the ditch had been opened to the extent indicated by the judgment entered in obedience of the opinion of this court, appellee brought this suit for damages to

his land from the closing of the ditch for the two years it had remained stopped up under the judgment. Appellants pleaded, in defense of the action, that the ditch had been stopped up in obedience to the order of the court, and relied upon that judgment as a protection to them for damages sustained by reason of what was done in obedience to it, there being no *supersedeas*. They did not allege, however, that appellee was party or privy to the case in which the judgment was rendered, and the court sustained a demurrer to this plea. There was then a trial, and verdict for defendants, which, on appeal to this court was set aside, the opinion of this court pointing out that the judgment pleaded was no bar, because it was not averred that appellee was party or privy to that action. *McAllister v. Bridges*, 19 Ky. L. R., 107, [40 S. W., 70]. There was no cross appeal in that case, and from the nature of the case there could be none; so the only question before the court was whether there had been a fair trial before the jury. Nothing more was considered or decided.

On the return of the case the defendant tendered an amended answer, in which he set out that Miller, while cleaning out the ditch, was acting as the agent and servant of appellee, McAllister; that appellee, with others, employed him to dig the ditch, and knew of the suit, testified in it as a witness, and that Miller was only their agent in the transaction. The court below refused to allow the amended answer to be filed, holding, in effect, that the judgment was no protection as to acts done under it, though not superseded. There was then another trial, resulting in a verdict for \$1,000 in favor of appellee.

The main question arising on this appeal is as to the effect of the reversed judgment on acts done under it and in obedience to it before its reversal, when it was not super-

seded. In Freeman on Judgments, section 482, it is said:

But a subsisting judgment, though afterwards reversed, is a sufficient justification for all acts done by plaintiff in enforcing it prior to the reversal. Thus, if the defendant be taken in execution, the subsequent reversal of the judgment will not render the plaintiff liable to an action for false imprisonment; for the act of imprisonment, when directed by the plaintiff, was sanctioned by a then valid judgment."

And in section 104b the same author says:

"The case of a judgment set aside for irregularity differs materially from that of one reversed upon appeal. In the latter case the error for which the judgment is ultimately avoided is imputed to the court, and the parties are not left without protection for the acts which they have done, based upon the judgment, and upon their confidence in the correctness of the decisions of the court."

The same principles are laid down in Black on Judgments, sections 170, 355. In *Kaye v. Kean*, 18 B. Mon. 847, Kean obtained a mandamus against Kaye, which he refused to obey, and, being imprisoned for disobedience, brought suit against Kean, upon a reversal of the judgment awarding the mandamus, for damages for his imprisonment. His petition was dismissed. The court said:

"The judgment of the circuit court was not void, but merely erroneous. . . . So long, therefore, as the judgment remained in force unsuspended and unreversed, it was the duty of the appellant to have rendered obedience to it. His contumacy subjected him to be proceeded against for a contempt, and as, therefore, there was sufficient cause for his imprisonment, he can not maintain an action therefor against the appellee."

In *Clark v. Rodes*, 12 Bush, 16, again this court said:

"A judgment is a final and conclusive determination of the rights of the parties to the litigation, and until it shall be reversed, vacated or modified in some one of the modes provided by law the parties can not refuse to obey it; nor can they, by subsequent litigation, indemnify themselves against its legal consequences."

In *Fraser's Ex'r v. Page*, 82 Ky. 73, an executor who had paid out a fund under a judgment which was not superseded, and afterwards reversed, was held protected by it for acts done in obedience to it while in force. The same ruling was made in *McKee v. Smith's Adm'r.*, 5 Ky. Law Rep., 224; *Shultz v. Beatty*, 6 Ky. Law Rep. 662; *Showalter v. Simmons*, 5 Ky. Law Rep. 423; *Dudley v. Beatty*, 5 Ky. Law Rep., 773.

These cases proceed upon the principle that what was lawful when done does not become unlawful by reason of subsequent acts. The chancellor in entering the judgment in the case referred to, did not act as the agent of either of the parties. The judgment was the act of the law. Neither party could control the court, and neither was responsible for his actions. The law constituted a tribunal to determine the rights of the parties. That determination, proceeding from a power above them, was in no sense their act. A litigant in this court does not procure the judgment entered in any such sense as to render him responsible for the consequence of the judgment, or its reversal by the United States Supreme Court. We have been referred to no case, and can find none, where an action for damages has been sustained upon the reversal of a judgment for acts done pursuant to it, as for a tort. The fact that there are no precedents for such recovery seems at this day conclusive that it has not

been recognized as admissible by either the bench or the bar. When a judgment is reversed, restitution must be made of all that has been received under it, but no further liability should in any case be imposed. The case of *Hays v. Griffith*, 85 Ky., 375 [3 S.W., 431, and 11 S.W., 306] is not supported by the weight of authority, and can not, in our judgment, be maintained on principle, so far as it lays down a greater liability. The quotation made from *Freeman on Judgments* is from a sentence omitted altogether in the last edition. The opinion is supported only by some cases in Illinois and California, and is contrary to the rule followed by the United States Supreme Court and all the other State courts, so far as we have seen. It is also in conflict with the well-settled rule that the court, in ordering or confirming a judicial sale, and the commissioner, in making it, do not act as the agent of the plaintiff. (*Bank of U. S. v. Bank of Washington*, 6 Pet., 9; *Rorer on Judicial Sales*, sections 1-12; *Foreman v. Hunt*, 3 Dana, 621.)

Appeals may be taken from judgments, ordinarily, within two years, but sometimes within five or twenty years, and it would often produce intolerable hardship to hold a litigant responsible for the consequences of an erroneous judgment under such circumstances. The object in having trust estates, including those of decedents, or those assigned for the payment of debts, settled in equity under the direction of the chancellor, is to protect the parties in the payment of the money, as well as to secure to every one his rights. A creditor with a small claim, who moved for a distribution of the fund, would, under the rule referred to, be responsible for the entire fund upon a reversal of the judgment, although he had received only a few dollars of it. Such a rule would destroy all confidence in judgments of courts, and make them the prolific parent, in many cases, of ruinous litigation.

Our system of courts and the principles governing them are derived from the common law. But in England the tribunal was called the *curia* or *court*, because it was held by the king himself originally. The judgments of the court read as the judgments of the king, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. Manifestly, there the subject was not responsible for damages for the act of the king. In this country the power vested in the king vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to their judgments while in force. It tends to prevent the troubles incident to the settlement of disputes by the act of the parties, often bringing about breaches of the peace or bloodshed. It is the duty of every good citizen to obey the mandates of the law, and no one should incur any responsibility by doing that which it was his duty to do. It is also the duty of every citizen to uphold the authority of the courts, and maintain respect for their judgments; and when, in doing this, he obeys a judgment of the court, it is a sound and safe rule that no liability for damages should arise therefrom.

The case of *Hays v. Griffith* is disapproved so far as it may be construed to lay down a different rule.

It remains to determine whether appellee was bound by the original judgment while it was in force.

In *Freeman on Judgments*, section 174, the rule is thus stated:

"Neither the benefits of judgments on the one side nor the obligations on the other are limited exclusively to parties and their privies. Or, in other words, there is a numerous and impor-

Bridges, &c., v. McAllister.

tant class of persons who, being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among those are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person."

In Herman on Estoppel and Res Adjudicata, sections 150-152, it is said:

"One who is benefitted by the prosecution of an action of which he has notice is to be regarded as a party in interest, although his name does not appear therein.

"A master or principal is in privity with his servant or agent when the latter defends an action in the right of the former, and a judgment is an estoppel to a renewal of the principal or master in the suit on the ground that he is considered the real party, and especially when the principal expressly or impliedly authorized or ratified the acts of the agent, virtually rendering him a party to the proceedings instituted by or against the other.

"In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so as to admit it when the same question has been decided and judgment rendered between parties responsible for the acts of others."

These conclusions are sustained by *Emery v. Fowler*, 63 Am. Dec., 627; *Hill v. Bain*, 2 Am. St. R., 873, [23 Atl., 44]; *Robbins v. City of Chicago*, 4 Wall., 672,—where many other authorities are collected. This subject was fully considered by this court in the case of *Schmidt v. L. C. & L. R. R. Co.*, 99 Ky., 143, [35 S. W., 135, and 36 S. W., 168],



and under the principles settled in that opinion and in the previous case of Warfield v. Davis, 14 B. Mon., 33, appellee was clearly bound by the judgment against his agent, Miller, in the original action. That action was clearly brought to settle the rights of the parties. It has since been recognized by them as settling their rights. Appellee brought no suit for damages for the filling up of the ditch until that judgment was reversed, and it may be safely assumed that he would not have sued at all if that judgment had been affirmed. The action has proceeded upon the assumption of both parties that the judgment in that case finally settled their rights, and that appellant could not relitigate here the right to stop up the ditch entirely, which was determined against him there. But the estoppel of a judgment is always mutual. If it binds one of the parties, so as to prevent him from showing the truth, it also estops the other. If the judgment referred to did not bind appellee until reversed, then it constituted no estoppel upon appellant in this action, and he might have shown all the facts, and had the jury pass on the question of fact determined there. Appellee has not proceeded with his case upon this theory, but both parties have recognized the judgment in the equity case as settling finally their rights in the ditch. This was, we think, a correct view of the law. The judgment finally rendered in that action is conclusive on both parties as to the right to maintain the ditch; and the chancellor's judgment, until reversed, was equally conclusive, and, not having been superseded, neither can maintain an action against the other for acts done in obedience to it while it was in force.

This question was not before the court on the last appeal of the case, and what was said then must be taken in reference to what was before

the court. There was no plea then of any facts showing that appellee was party privy to the judgment relied on in bar, or bound thereby in any way. These facts having been pleaded on the return of the case, the question is now before the court for the first time. Then there had been a verdict for the defendant. There was no cross appeal, and could be none, and the only question was whether there had been a fair trial under the issues presented.

The rule is well settled that a question not in issue, though passed upon in the opinion on a prior appeal, is not *res judicata* on a subsequent appeal, where the issue was properly made by pleadings filed after the first appeal. (See note to *City of Hastings v. Foxworthy*, 34 Lawy. Rep. Ann., 344, s. c. [63 N. W., 955]), and cases cited.) Thus in *O'Brian v. Com.*, 6 Bush, 563, it was held that a discharge of a juror after the jury was sworn, without the defendant's consent, did not operate to acquit him. But when this opinion was rendered there had been no plea of former jeopardy. On the return of the cause to the lower court the defendant put in this plea, and, having been again convicted on a second appeal, the former opinion was held not to include the question, and the defendant was discharged. 9 Bush, 333, [15 Am. R., 715]. This rule has the indorsement of the United States Supreme Court, and seems to us sound, and necessary to the proper administration of justice. (*Barney v. Winona, etc., Railroad Co.*, 117 U. S., 228, [6 Sup. Ct., 654].)

The judgment complained of is therefore reversed, and cause remanded, with directions to the court below to grant appellant a new trial, to allow the amended answer "xx-1" and "x-1" and "x-2" to be filed, and for further proceedings not inconsistent with this opinion.

CASE 101—ACTION TO FORECLOSE LIEN—JUNE 10.

## Cook v. Union Trust Co., Etc.

106 803  
138 17

APPEAL FROM MASON CIRCUIT COURT.

**LIMITATION—EFFECT OF PAYMENTS ON SUBSEQUENT MORTGAGEE.**—As between a vendor holding a lien for unpaid purchase money and a subsequent mortgagee of the land, no payments made on the vendor's lien after the execution of the mortgage, will operate to elongate the statutory limitation, but as against such mortgagee limitation will run from the time of the last payment made before the execution of the mortgage.

**A. M. J. COCHRAN FOR APPELLANT.**

The appellant's vendor's lien which was prior in time to the mortgage to appellee, the trust company, and which was unreleased upon the record at the time the trust company's mortgage was taken, is superior to the mortgage lien. *Tate v. Hawkins*, 81 Ky., 577; *Kendall v. Clarke*, 90 Ky., 178; *Carr's Exr. v. Robinson*, 8 Bush, 274; *Trousdale's Admr. v. Anderson*, 9 Bush, 277; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky., 353; *Hughes v. Edwards*, 9 Wheat., 151; *Ewell v. Daggs*, 108 U. S., 147.

**THOS. R. PHISTER FOR THE APPELLEE.**

1. A lien upon land, subsequently mortgaged, is a charge upon the land which it is not the policy of the law, nor in accordance with its analogy should exist any longer than the statutory existence of the note creating it.
2. While a partial payment on a note for the purchase price of land within fifteen years, has the effect as to the vendee to suspend the running of the statute of limitations, it does not have the effect as to a subsequent mortgagee not a party to the transaction. *Tate v. Hawkins*, 81 Ky., 577; *Kendall v. Clark*, 90 Ky., 178; *Montgomery v. Tabb*, 19 Ky. Law Rep., 468.
3. A mortgagee is a purchaser *pro tanto* and entitled to the protection of a purchaser. *Murphy v. Boyd*, 4 Ky. Law Rep., 441; 1 Ky. Law Rep., 345; *Ricketts v. Hooper*, 4 Ky. Law Rep., 444; *Halbert v. McCulloch*, 3 Met., 456; *Snyder v. Hitt*, 2 Dana, 204.

JUDGE WHITE DELIVERED THE OPINION OF THE COURT.

In January, 1875, the executors of A. Hord sold and conveyed to A. M. Bramel certain lands in Mason county

for a consideration in cash and with some deferred payments, payable in one and two years from date. The deed to Bramel reserves a lien for these unpaid notes. These two notes were assigned to appellant, Cook. In March, 1891, Bramel executed a mortgage on this land to appellee, Union Trust Company, to secure a loan made by it. In September, 1892, Bramel executed a deed of general assignment of all his property for the benefit of all his creditors.

Payments were made on these two notes of appellant annually up till 1892. In July, 1893, this action was brought by appellant, Cook seeking a judgment and decree of foreclosure to satisfy the vendor's lien. Appellee trust company was made a party as well as the assignee under the deed of assignment. No defense was made by Bramel or his assignee; but appellee trust company filed its answer and cross petition, and asserted its mortgage lien as being prior to that of appellant by reason of the fact that more than fifteen years had elapsed since the notes of appellant had become due.

Appellant, by reply, denied the priority of appellee's mortgage lien, and alleged the fact of payments made by Bramel each year since 1877, and that her notes were not barred, and, further, when appellee took its mortgage fifteen years had not elapsed from the maturity of the notes for which a lien was retained in the deed to Bramel. The court sustained a demurrer to this reply, and appellant failing to plead further, judgment was rendered for the sale of the property, giving the appellee trust company priority. From that judgment this appeal is prosecuted. It is conceded that as to Bramel and his assignee in trust for the benefit of creditors the appellant has a lien on the land by reason

of the payments made by Bramel, and that as to part of the judgment there is no contest.

It is contended for appellant that the payments made by Bramel operated to extend from that date the notes, and that the lien is but an incident of the debt, and as long as the debt is not barred the lien exists, and, being a vendor's lien, is superior to all other liens.

On the other hand, it is contended that as to vendees and mortgagees without actual notice, as appellee is alleged to be, the lien does not exist longer than the statutory time that will bar the debt. That the vendee or mortgagee is entitled to know by an inspection of the records for a period of fifteen years next before whether there exists any liens, and, if none, within that time then as to such vendee or mortgagee no lien will exist. It is insisted that the payments on the note operated to extend the statutory bar only as between the payor and payee, and will not extend it as to vendees and mortgagees without at least actual notice of such payments and extensions. To support the contention of appellee, and which was followed by the lower court, we are referred to the cases of *Tate v. Hawkins*, 81 Ky., 578 [50 Am. R., 181], and *Kendall v. Clarke*, 90 Ky., 179 [13 S. W., 583].

The facts of the case of *Tate v. Hawkins*, as stated by the court in the opinion, are: In 1862 Hawkins executed a note due March, 1863, to one Jennings, his vendor, for the balance of purchase price of land. In 1864 this note was assigned to Tate. On the date of this assignment of the note Hawkins sold and conveyed the land for cash consideration to Basket. In 1875 Basket sold for cash consideration the land to Milner. In 1881 an action was brought by Tate against Hawkins and Milner, seeking to recover the note

and enforce the vendor's lien claimed. Indorsements on the note showed that there was payment made March, 1873, and another March, 1878. Thus the note as to Hawkins was not barred by limitation. The court, per Judge Lewis, said: "By the terms of the statute, the action of appellant on the note was barred fifteen years after the note matured, and he had then lost his right to maintain the action for the enforcement of the lien. If appellee Milner is now to be deprived of the safeguard provided by law, and upon the faith of which he purchased and paid for the land, it is to be done by an obstruction to the running of the statute, and a recognition of the cause of action after it had by law ceased to exist, made by Hawkins without his consent or notice to him. . . . The lien is a charge upon the land, which it is not the policy of the law, nor in accordance with the analogy of the law, should exist longer than the statutory existence of the note; and, if reasons were necessary to justify this salutary and necessary principle, they are afforded by the circumstances of the case."

In the case of *Kendall v. Clarke* the court, by Judge Lewis, said: "It is obvious more than fifteen years had elapsed from the time the note fell due until the action was instituted; but, to avoid the plea of limitation, a credit of \$18.80 indorsed on the note as of January 2, 1882, is relied on, and seems to have been considered by the lower court sufficient for the purpose.

"Whatever may be the operation of the credit so far as Royse, while living, and his personal representative and devisees afterwards might have been, it certainly did not nor should have the effect to continue, beyond the period of fifteen years, the lien on that part of the land purchased by appellant Campbell; for it was expressly decided by this court in *Tate v.*

Hawkins, 81 Ky., 577, [50 Am. R., 181], that, while a partial payment made by the original vendee on a note for the purchase money within fifteen years would have the effect, as to him, to suspend operation of the statute of limitation between accrual of cause of action on the note and date of payment, the rule could not be applied to the prejudice of a remote vendor nor a party to the transaction. Consequently, the statute of limitation is, as to Campbell, clearly a bar, and it was error to enforce the alleged lien on and subject to satisfaction of the note, any portion of the original tract owned by him."

The note in this Kendall case was payable December, 1869, and the action was brought May, 1885. The date of Campbell's purchase, as shown by an examination of the record, was before the statutory bar and before the payments that elongated the statute of limitation as a bar—facts similar in every way to Tate v. Hawkins.

These cases, appellee contends, are conclusive of the question that the judgment of the lower court is the law. We are referred by appellant's counsel to the cases of McCracken Co. v. Mercantile Trust Co., 84 Ky., 344, [1 S. W., 585]; Hughes v. Edwards, 9 Wheat., 489; Ewell v. Daggs, 108 U. S. 143, [2 Sup. Ct., 408]; Perkins v. Sterne, 23 Tex., 561; [76 Am. Dec., 72]; Duty v. Graham, 12 Tex., 427; Flanagan v. Cushman, 48 Tex., 241; and Sanger v. Nightingale, 122 U. S., 176, [7 Sup. Ct., 1109].

In the case in 84 Ky., 344, [1 S. W., 588], it is said: "There is no statute of limitations as to liens. If the claim becomes barred, the lien dies with it. If the claim could be made an incident of the lien, then the statute of repose would be defeated. As the claim no longer legally existed, the lien

had nothing to support its existence." This case was a tax lien, which was barred in five years.

In the case of *Bank v. Thomes*, 8 Ky. Law Rep., 690, [3 S. W., 12], the court said: "The mortgage was a mere incident to the debt and given to secure its payment; and, when the right of recovery as to the debt itself is gone, the lien to secure it necessarily goes with it. The stipulations of the mortgage are not independent covenants upon which a recovery can be had regardless of the debt, to secure the payment of which the mortgage was given. The liability of appellee is on the original paper as the drawer; and, when that liability ceases, the covenants in the mortgage, having created no new right, except the lien, can not be looked to as extending the liability from five to fifteen years."

In the case of *Prewitt v. Wortham*, 79 Ky., 287, the court said:

"The rule in this State in reference to mortgages, whether on personal or real estate, is that they are mere securities for the debt. No title passes to the mortgagee and no right is acquired by the mortgagee, except as an incident to the debt. When the debt to secure which the mortgage was given is barred by statute, the incident goes with the principal, and the mortgage ceases to be enforceable."

Likewise it has been repeatedly held a mortgage or vendor's lien is an incident of a debt, and that an assignment of the principal obligation carries the right of lien.

All this proposition as to the lien being an incident of the debt and lives with the debt it secures is conceded to apply as between the payor and payee of the debt. But it is contended that as to vendees and mortgagees the same



rule does not apply; that as to vendees and mortgagees the lien is barred when the period fixed by statute will bar the debt,—this, regardless of any elongation of the debt by payments or new promises.

We are of opinion that as to vendees and mortgagees the same rule does not apply as between the parties; but we do not assent to the doctrine that as to vendees and mortgagees all liens are barred in fifteen years after the accrual of the right of foreclosure.

We are of opinion that after the payee of the note has sold the property in lien, or, as in this case, mortgaged the property, a subsequent payment by Bramel would not elongate the lien on the land as to the appellee trust company, for then the trust company would be subject to the action of Bramel, over whose actions it had no control, and against which it could not guard. However, we are of opinion that, as to the appellee trust company, mortgagee, the lien of appellant for purchase money existed for the full length of time from the date of the last payment or last promise by Bramel made before the execution of the mortgage to appellee trust company, which payment, as stated in the reply of appellant, was January 6, 1892, the mortgage being executed in September, 1892.

Wood on Limitations, section 229, “ . . . Any act of the mortgagor which operates to keep the mortgage debt on foot also operates to keep up the mortgage lien, as an acknowledgment of the debt by the mortgagor in the mode and with all the formalities required by law. A part payment of principal or interest made by the mortgagor or his agent revives the mortgage and gives it a new lease of validity from the date of such payment. . . . But, in order to have that effect, the payment must be made

while the mortgagor owns the equity of redemption, and a payment made after he has parted with the same, does not revive or keep on foot the mortgage security, as, from the time when he parts with his interest in the land, his power to bind it in any manner is gone, either as to past or future debts."

Jones on Mortgages (5th Ed.), section 1201, lays down this rule: ". . . Moreover, any purchaser from the mortgagor, with actual or constructive notice of the mortgage, is bound by any previous acknowledgment of the debt by his grantor,"—citing *Heyer v. Pruyn* 7 Paige, 465, [34 Am. Dec., 355]; *Hughes v. Edwards*, 9 Wheat., 489; *Carson v. Cochran*, (Minn.), [53 N. W., 1130]. The same author, continuing (section 1202), says: "A purchaser with actual notice of the mortgage, or constructive notice by means of a registry, can avail himself of the presumption of payment from lapse of time only when the mortgagor could avail himself of it under the same circumstances. The grantee succeeds to the estate and occupies the position of his grantor. He takes subject to the incumbrance, and his title and possession are no more adverse to the mortgagee than were the title and possession of the mortgagor. The purchaser is bound by the acts and declarations of the mortgagor . . . while he retains the equity of redemption, or any part of it; as, for instance, the purchaser of a part of the mortgaged premises can not claim a presumption of payment of the mortgage from lapse of time when this presumption is repelled by payments of interest made by the mortgagor within twenty years, or by his admissions within that time that the mortgage was then subsisting. A purchaser from the mortgagor stands in no better position than the mortgagor himself as to gaining title by possession and lapse of time,

if the mortgage be recorded. The record is notice of the mortgage to a subsequent purchaser, and the mere fact that he has had actual possession under his purchase for the statute period of limitation is no bar to a foreclosure of the mortgage."—citing *Herndt v. Porterfield*, (Iowa.) [9 N. W., 322]; *Johnson v. Laster Association*, (Tex. Civ. App.), [21 S. W., 961]; *Whittacre v. Fuller*, 5 Minn., 508; *Ware v. Bennett*, 18 Tex., 794.

In the case of *Hughes v. Edwards*, 9 Wheat., 489, the Supreme Court said: "It is objected, in the third place, that the respondents are barred of their right to foreclose by length of time. It is not alleged or pretended that there is any statute of limitations in the State of Kentucky which bars the right of foreclosure or redemption, and the counsel for the appellants place this point entirely upon those general principles which have been adopted by the courts of equity in relation to this subject. In the case of a mortgagor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years' adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored. In respect to the mortgagee who is seeking to foreclose the equity of redemption, the general rule is that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by the payment of the money or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the



like. Now this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff (1803 and 1808) admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were indorsed on the bond for payments acknowledged to have been made, which, though blank, the court below ascertained to have been made on the 15th of January, 1798, the 15th of May, 1803, and the 2d of August, 1808.

The mortgagor, then, can not rely upon the length of time to warrant a presumption that his debt has been paid or released; the circumstances above detailed having occurred from eight to thirteen years only prior to the institution of this suit.

"But it is insisted that, although these acknowledgements may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they can not affect the other defendants, who purchased from him parts of the mortgaged premises for a valuable consideration. The exclusive answer to this argument is that they were purchasers with notice of this incumbrance. It must be admitted that it was but constructive notice; but, for every purpose essential to the protection of the mortgagee against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser with notice can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights.

"The mortgagor, after forfeiture has no title at law and none in equity, but to redeem upon the

terms of paying the debt and interest. His conveyance to a purchaser with notice passes nothing but an equity of redemption, and the latter can no more than the mortgagor assert that equity against the mortgagee without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them.

"The court is therefore of opinion that this objection can not be sustained by either of the appellants."

But when the obligor has parted with title to the property, either by sale absolute or by mortgage, his right to further bind the property ceases, except as his interest therein exists; and the elongation of the debt by payments or new promises can only operate as against the obligor and his property, for no act of his would work an estoppel against his vendee or mortgagee.

This principle is not in conflict with that of *Tate v. Hawkins*, but accords therewith. In that case *Hawkins* sold the land by deed in 1864 to *Basket*. The lien notes then had some fourteen years to run. *Tate* could at any time within the fourteen years have enforced his lien on the land. The subsequent payments by *Hawkins* in 1873 and 1878, made after the alienation of the land by *Hawkins*, operated to elongate the note, but could not extend to the land, for the reason that at the date of these payments *Hawkins* had no control over the land, and could not bind it further than he had done so while he was the owner.

The same is true of the *Kendall v. Clarke* case.

In this case the notes given, if no payments had been made, were not barred by limitation at the date of the mortgage to appellee trust company, and any inspection

of the record would have put it on notice concerning appellant's debt.

At the date of the mortgage to appellee, the appellant, by reason of the annual payments made by Bramel, had fourteen years in which she could collect her notes and enforce her lien, and it can not be said that, by reason of the fact that Bramel executed a mortgage to appellee trust company, this right to enforce collection and her lien was reduced to fifteen years from the original date of maturity. To so hold would allow a debtor to defeat the collection altogether of a debt, if by payments he had been indulged beyond the period of limitation, on the idea that, being the payor and owner of the property, he could by payments elongate both note and lien. For after the lapse of fifteen years from the date of maturity, when it would be barred, except for the payments, the debtor could sell the property free of lien. This can not be the law. The vendee or mortgagee accepts the position as it is when his conveyance is executed. The holder of the lien has all the time to enforce the lien, as the facts of the case at that time give him and no more.

It follows that the appellant's lien for purchase money is not barred by limitation, and she is entitled to have same enforced, even as against the mortgagee trust company. Being a vendor's lien, it is prior to the mortgage lien.

The trial court, therefore, erred in sustaining a demurrer to her reply.

For the reasons indicated, the judgment appealed from is reversed, and cause remanded for proceedings consistent herewith.

(The whole court considered this case. Judge Guffy dissented.)

CASE 102—ACTION ON INSURANCE POLICY—JUNE 13.

106	815
128	361

106	815
137	265

## London &amp; Lancashire Insurance Co., v. Gerteisen.

APPEAL FROM DAVIESS CIRCUIT COURT.

1. **INSURANCE— SOLICITING AGENT.**—One who solicits insurance by an agreement between himself and an agent of the company will be treated as an agent of the company, and his knowledge of the facts pertaining to the insurance will be deemed the knowledge of the company.
2. **SAME—WAIVER.**—An insurance company which issues a policy with knowledge that conditions inserted in the policy for its benefit are not to be complied with, will be held to have waived same.
3. **SAME—AGREEMENT TO FURNISH WATCHMAN.**—An agreement to keep a watchman on duty at all hours of the night is not an absolute warranty; and the court properly limited its instruction to find for the defendant on account of a failure to do so by inserting the condition that "by reason of such failure the loss occurred."

CHAPEZE WATHEN FOR APPELLANT. (CHAS. B. RUDD OF COUNSEL.)

1. The policy was void because the subject of insurance was a building on ground not owned by the insured in fee simple. *Home Ins. Co. v. Allen*, 93 Ky., 271; *Hartford Ins. Co. v. Haas*, 87 Ky., 531.
2. George Hawes was not the agent of the appellant and his knowledge was not the knowledge of the company. *Phoenix Ins. Co. v. Splers & Thomas*, 87 Ky., 285; *Mechem on Agency*, sec. 197.
3. The policy was void because, at the time of the fire, the distillery had ceased operations for more than ten consecutive days. *Robinson v. Aetna Ins. Co.*, 18 Ky. Law Rep., 865; *McKenzie v. Scottish Union & Natl. Ins. Co.*, 44 Pac. Rep., 922.
4. The provision of the policy as to the night watchman was a warranty and should be strictly performed. In this instance the contract was not kept. *May on Insurance*, secs. 156-157; *Wood v. Insurance Co.*, 13 Conn., 533; *Marshall on Insurance*, p. 249; *McKenzie v. Scottish Union and Natl. Ins. Co.*, 44 Pac. Rep., 922; *Ky. Stats.*, sec. 639; *Genl. Stats.*, p. 308.
5. The court erred in instructing the jury.



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London & Lancashire Insurance Co. v. Gertelsen.

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## HILL &amp; HILL FOR THE APPELLEE.

1. Knowledge of the agent is knowledge of the company, and that provision of the policy releasing the company from liability, if the subject of insurance is on leased premises is waived. 10 Ky. Law Rep., 573; 11 Ky. Law Rep., 288; 87 Ky., 285 and 538; May on Insurance, sec. 143, p. 161; Genl. Stats., sec. 633. 16 Ky. Law Rep., 122; 83 Ky., 574.
2. If the risk is not increased by the act of the assured the company can not escape liability. German Ins. Co. v. Hart, 16 Ky. Law Rep., 344; 89 Ky., 330; 11 Ky. Law Rep., 539; 7 Ky. Law Rep., 45.
3. The distillery was not in operation at the time of the issue of the policy, and this fact was known to the agent, and hence the company waived any provision in the policy requiring the distillery to be in operation to create liability. 8 Ky. Law Rep., 876; 91 Ky., 208; 15 Ky. Law Rep., 208; 12 Ky. Law Rep., 191; 11 Ky. Law Rep., 721; 90 Ky., 236; 12 Ky. Law Rep., 115.

## JUDGE HOBSON DELIVERED THE OPINION OF THE COURT.

Appellant issued to appellee on July 9, 1896, a policy by which it insured appellee's distillery to the amount of \$700 for twelve months from that time. On the 17th of November following, the property insured was destroyed by fire, and, appellant refusing to pay the policy, appellee instituted this action on May 8, 1897. Appellant defended the action on the ground that appellee had leased the ground on which the distillery stood, and that it was not in operation at the time of the fire; the policy providing that it should be void in case the insured was not the absolute owner of the property, and that it should not be in effect if the distillery was not in operation for ten consecutive days. The policy also provided that appellee should keep a night watchman on duty during all hours of the night, and it was alleged that he had failed to do this. It appeared from the proof that George Hawes solicited the insurance, and got appellee to take it out. Hawes got a description of the property, and sent the application for the insurance, with three other applica-



tions he took that day, to J. C. Rudd & Son; for whom he was soliciting insurance. Rudd & Son were agents for appellant, and made out the policy, and Hawes notified appellee, and he went and got it, and paid the premium. The arrangement between Hawes and Rudd was that Hawes was to make out applications to secure insurance, and receive one-half of the commission for his services. Rudd did not tell him what company he would place these risks in, but said he would place them in a first-class company. At the time the application was made, Hawes was informed of the condition of the title. The property was not then in operation, and he was told that it would not be operated until in the fall. Rudd was not made acquainted with these facts, appellee having no transaction with him, the business being done with Hawes.

It is well settled that if a policy of insurance is issued containing provisions that the policy shall be void if the title is not absolute in the assured, or if the property should cease to be occupied or operated, the company will not be allowed to rely on these conditions if, at the time it issued the policy, the facts were known to it. For in this event the policy would have no operation; and the company taking the money of the assured has been properly held estopped to say that the policy had no operation at all. (*Kenton Insurance Co. v. Downs*, 90 Ky., 236, [13 S. W., 882].)

It is also well settled that knowledge of the agent who represents the company in the transaction is the knowledge of the company. It is insisted, however, that Rudd alone was appellant's agent, that Hawes had no authority from it, and that it is not chargeable with facts known to Hawes, unless communicated to Rudd. This is the decisive question in the case.

According to the testimony, Hawes was, in effect, the partner of Ruff in effecting this insurance. The rule that a delegated authority can not be delegated has some limitations. It is usual for insurance agents who issue policies to send out solicitors to take applications on which the policies may be issued, and authority to do so may be inferred, nothing appearing to the contrary, for this is the common way the business is done. When Hawes came to appellee professing to be an insurance agent, and took his application, and obtained for him the policy of insurance, he had a right, without notice of a defect in his powers, to regard him the agent of the company for this purpose; and appellant, by accepting the application, issuing the policy, and keeping the premium, is estopped to say his act was unwarranted, and must take the benefit with the burden.

In *Phoenix Insurance Co. v. Spiers*, 87 Ky., 297, [8 S. W., 453], this court laid down the rule that the party soliciting the insurance and taking the application, in the absence of notice to the contrary, should be held the agent of the company. This rule was recently approved by this court in the case of *Rogers v. Farmers' Mutual Aid Association*, 20 Ky. Law Rep., 1925 [50 S. W., 543]. These cases are in accord with the weight of authority, and are conclusive here. See *May on Insurance*, section 143, and cases cited.

The only remaining question in the case is the defense that the appellee did not keep a watchman at all hours of the night. The proof shows that there was a watchman, who had gone around and seen that everything was all right less than an hour before the fire, and at the time of the fire was sitting down, reading a newspaper.

The court instructed the jury that it was the plaintiff's duty to keep a watchman on duty at all hours of the night, and that, if they believed from the evidence that he failed to keep a watchman on duty at all hours of the night, and by reason of such failure the loss occurred, they should find for the defendant.

It is insisted that the jury should have been told that the plaintiff could not recover if he failed to keep a watchman on duty at all hours of the night, although the loss would have occurred just as it did notwithstanding this. The contention is that this stipulation in the policy was an absolute warranty, that there can be no recovery if it is broken, and that it was broken unless the watchman was kept constantly watching at all hours of the night.

In Wood on Insurance, section 186, the rule is thus stated:

"When a policy requires a watchman to be kept on the premises, the insured is not required to keep one there constantly; but only at such times and during such periods as men of ordinary care and skill in such business employ one, and in this respect the usage of similar establishments is admissible."

The proof fully warranted the jury in concluding that appellee had used ordinary care in keeping a watchman on duty at night, and, though the phraseology of the court's instruction is not exactly the same as that in which the rule is usually stated in the text-books, under the facts of the case we do not see that there was any substantial error to the prejudice of appellant.

Judgment affirmed.

George, et al., Commissioners, &c., v. Lillard, Warden.

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CASE 103—VALIDITY OF PAROLE LAW—JUNE 13.

George, et al., Commissioners, Etc. v. Lillard,  
Warden.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. **CONSTITUTIONAL LAW—PAROLE ACT.**—The act of May 2, 1888, conferring on the Commissioners of the Sinking Fund the power, under certain conditions, to parole convicts, is not unconstitutional either (1) as an infringement of executive prerogative, or (2) as a violation of the constitutional requirement that convicts shall be confined within the walls of the penitentiaries.
2. **STATUTES—REPEAL.**—The parole law of May 2, 1888, was not repealed by the act of 1898, creating a prison board, but the powers conferred and the duties imposed by the former act yet rest with the Commissioners of the Sinking Fund.

JOHN W. RAY FOR THE APPELLANT. (C. P. CHENAULT OF COUNSEL.)

1. The parole law as found in the Kentucky Statutes, secs. 3828-3836 is not unconstitutional either in invading the executive prerogative, or in invading the jurisdiction of the courts as to the suspension, reversal or annulment of judgments of conviction or as a violation of section 253 of the Constitution. *State v. Peters*, 43 Ohio St., 629; *People v. State Reformatory*, 148 Ill., 413; *George v. People*, 167 Ill., 447; *Miller v. State*, 49 N. E. R., 894; *Murray v. Com.*, 52 N. E. R., 505; s. c. 87 Fed. Rep., 549; *Oliver v. Oliver*, 169 Mass., 592; *Com. v. Brown*, 167 Mass., 144.
2. It was clearly the intention of the Legislature to invest the appellants with all the powers the Sinking Fund Commissioners had theretofore exercised so far as the penitentiary was concerned. *People v. Cummins*, 88 Mich., 249; *Debates Constitutional Convention*, pp. 5315, 5386, 5389, 5390, 5391; *Com. Sinking Fund v. George*, 47 S. W. R., 779.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER  
FOR APPELLEE.

1. The parol law is unconstitutional and an invasion of the executive prerogative, of the power of the courts over judgments of conviction and as a violation of the provisions of the State Constitution which required convicts to be kept within the walls of the penitentiary.

George, et al., Commissioners, &c., v. Lillard, Warden.

2. If the parole law be held constitutional, then the power to parole vests in the Sinking Fund Commissioners and not in the prison board.

Citations: Acts 1879, vol. 1, p. 147; acts 1887-8, vol. 1, p. 115; acts 1889-90, vol. 1, p. 66; acts 1898, ch. 4; acts 91-2-3; ch. 194; Com. v. Holloway, 42 Pa., 448; State v. Peters, 4 N. E. R., 81; People v. Cummins, 14 L. R. A., 285; 23 Am. & Eng. Ency of Law, 357.

JUDGE PAYNTER DELIVERED THE OPINION OF THE COURT.

The questions here involved are: (1) Is the act known as the "Parole Law" still in force? If so, is it to be executed by the Board of Penitentiary Commissioners or by the Commissioners of the Sinking Fund? (2) Is it constitutional?

Until 1898 the control and management of the penitentiaries of the State was vested in the Commissioners of the Sinking Fund; the Governor, Auditor, Treasurer, Secretary of State, and Attorney General *ex officio* constituting the commissioners. By the act of May 2, 1888, upon specified conditions, the commissioners of the sinking fund were authorized to allow persons confined in the penitentiaries, except those who were convicted of certain offenses, to go on parole outside of the buildings and the inclosure of the penitentiaries, free from the custody and control of the warden, but to remain in the legal custody and control of the commissioners, subject at any time to be taken back and confined in the penitentiary. Full power to enforce rules and regulations for retaking and reimprisoning any convict upon parole existed. To retake such prisoner, *the written order of the commissioners, when signed by the Governor* and attested by the Secretary of State, constituted a sufficient warrant to authorize sheriffs and other officers to arrest such convict and deliver him to the custody of the warden. The expense of rearrest was to be paid by the State Treasurer when

George, et al., Commissioners, &c., v. Lillard, Warden.

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the commissioners certified it for payment to the Auditor of Public Accounts. The act provided a penalty against the warden or any other officer in the State who failed to execute and obey the orders of the commissioners made or issued under the act.

It is contended that this law is no longer in force, because it has been repealed by the act which became a law in 1898, entitled "An act to create a Board of Penitentiary Commissioners and regulate the penal institutions of this Commonwealth."

It is true that under that act the management and control of the penitentiaries was taken from the commissioners of the sinking fund, and placed in the hands of the Board of Penitentiary Commissioners, but there is nothing in the act which makes any reference whatever to the parole law. That subject is not referred to in any way in the act. Repeals by implication are not favored.

We are of the opinion that the parole law has not been repealed.

It is contended, however, that, because the control and management of the penitentiaries was placed in the hands of the Board of Penitentiary Commissioners, the power to execute the law is vested in them. We do not think this is true, in the first place, because no express authority was conferred upon them, and, in the second place, the act provides for the reimprisonment of parole convicts. By the terms of the act, they can only be arrested and imprisoned upon the order of the Commissioners of the Sinking Fund, when signed by the Governor and attested by the Secretary of State. As the act denounces a penalty only for disobeying the orders of the Commissioners of the Sinking Fund, it would follow that no penalty could be imposed on any officer for disobeying the orders of the pen-

itentiary commissioners. The Legislature might have been perfectly willing to vest the power to parole prisoners in the Commissioners of the Sinking Fund, of which body the Governor was a member, but it might not have been willing to enact a law conferring such authority upon the Board of Penitentiary Commissioners. If the present commissioners were permitted to exercise this power, the Governor would not be associated with them in determining what convicts should have the benefit of the law.

We are of the opinion that the Board of Penitentiary Commissioners have no power to parole a prisoner under the law, and that that power is vested in the Commissioners of the Sinking Fund. Section 77 of the Constitution, in reference to the power of the Governor, reads: "He shall have power to remit fines and forfeitures, commute sentences, grant reprieves and pardons."

If paroling a prisoner is not a pardon of the prisoner, or commutation of the sentence, then the power vested in the Governor is not attempted to be interfered with. "A 'pardon' is an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed." *United States v. Wilson*, 7 Pet., 150. "A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction." *Com. v. Bush*, 2 Duv., 264. A pardon discharges the individual designated from all or some specified penal consequence of his crime. It may be full or partial, absolute or conditional. *Bouvier Law Dict.* title, Pardon; 1 *Bishop's Crim. Law* (6th Ed.) section 914. It can not

George, et al., Commissioners, &c., v. Lillard, Warden.

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be said to be a pardon because the prisoner remains subject to the control of the Commissioners of the Sinking Fund, and is subject to be rearrested, and, when rearrested, is compelled to remain in the penitentiary without getting any credit for the time between the parole and redelivery to the warden. He is not exempt from the entire punishment which the law inflicts. The Governor could at any time pardon him, and thus place it beyond the power of the Commissioners of the Sinking Fund to re-imprison him. It is not a commutation of the sentence, because it is not a change of the punishment of a person who has been condemned into a less severe one. If a man is sentenced to the penitentiary for twenty years and the Governor reduces the time to ten, if a party is sentenced to hang and the Governor changes the penalty to confinement in the penitentiary for life, or if a man was condemned to serve in the penitentiary for a given period and the Governor would say he should serve in the county jail for a shorter term, then we would understand in each case that there had been a commutation of the sentence. Whilst, in the case of a paroled prisoner, he enjoys his liberty outside of the walls of the penitentiary, yet he remains under the sentence to which he has been condemned, and may be reimprisoned, at any time, as we have heretofore said. So, strictly speaking, it can not be said there has been a change of punishment to a less severe one. The parole law is not an interference with the judicial functions of the court, but is the exercise of the power of discipline which the State possesses, to be exercised through the legislative department of the government. The Legislature declares what shall constitute offenses, and prescribes the punishment, and the power to regulate the penal institutions of the State is there vested. It is



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George, et al., Commissioners, &c., v. Lillard, Warden.

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said the act is invalid by reason of section 253 of the Constitution, which reads as follows: "Persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary; and the General Assembly shall not have power to authorize employment of convicts elsewhere, except upon the public works of the Commonwealth of Kentucky, or when, during pestilence or in case of the destruction of the prison buildings, they can not be confined in the penitentiary." The purpose of the enactment of that section of the Constitution was to prevent the working of convicts by the State outside of the prison walls. That was the evil intended to be remedied by the prohibition contained in the section. It was not intended to prohibit the Legislature from enacting a law like the one under consideration, because, at the time of the adoption of the Constitution, such a law was in force, and the Constitutional Convention certainly would have, in express terms, declared the Legislature should not have power to enact such a law if it regarded it unwise to do so.

The judgment is affirmed.

JUDGE GUFFY DISSENTS.

The appellants, who are commissioners in control of, and managing the penitentiaries of the State, assumed the right to parole one John Dugan, a prisoner convicted of the offense of manslaughter. The authority to parole Dugan is claimed under the act of May, 1880, and amendments thereto.

It will be seen, by examination of the statutes in force prior to 1889, that the Governor, Attorney General, Auditor, Secretary of State, and Treasurer constituted the board of Sinking Fund Commissioners, and as such had the control of the penitentiaries, and were by law authorized to parole prisoners.

George, et al., Commissioners, &c., v. Lillard, Warden.

The effect of the parole was to discharge the prisoner from actual custody, and give him complete freedom of action. He could go where he chose to go, and labor for himself, and was allowed to dress as other citizens. He was, however, required, if he remained in the State, to report, through the county judge, twice a year, to the commissioners. The commissioners also had the right to order the arrest and return of the convict to prison.

The appellants in this case claimed and attempted to exercise the power to parol said Dugan, but the appellee Lillard, who is warden of the prison, refused to discharge Dugan, and appellants brought this suit to obtain a mandamus requiring appellee to respect the parole aforesaid.

The court below sustained a demurrer to the petition, and dismissed the action, and appellants prosecute this appeal.

The majority opinion affirms the judgment, and I concur in the affirmance. But the majority opinion takes up the question of the constitutionality of the so-called "Parole Law," and decides that it is constitutional, and may be enforced by the commissioners of the sinking fund.

I dissent entirely from the opinion in so far as it holds the act in question to be constitutional.

I am also of the opinion that the parole law stands repealed.

The acts of 1891-92-93 provided for the government of the penitentiaries, and it seems to me that under the rule announced in *Broadbudd v. Broadbudd* the parole law stands repealed.

The act of 1898 took the control and management of the penitentiaries from the sinking fund commissioners, and

vested it in appellants, and no reference was made to the parole law. If the parole law could be defended at all, it seems to me that it could only be for the reason that the officers in control of the prisoner would be able to exercise the power wisely; but now the power, according to the majority opinion, is vested in officers who have no knowledge of the conduct of the prisoners, nor any means of information except through other officers.

If, however, the parole law has not been repealed, I am of opinion that it is unconstitutional and void.

Section 77 of the Constitution provides that the Governor shall have power to commute sentences, grant reprieves and pardons.

Bouvier's Law Dictionary adopts Blackstone's definition of "reprieves," as follows: "The withdrawing of a sentence for an interval of time, which operates in delay of execution."

The parole provided for by the act under consideration is clearly a reprieve, and nothing else, and is therefore an invasion of the power vested in the Governor, and it is no answer to say that he is one of the commissioners. If the parole law is valid, a majority of the commissioners can exercise the power, although the Governor might oppose it.

Mr. Webster defines "reprieve" as follows: 1st. "To delay the punishment of; to suspend the execution of sentence; . . ." 2d. "To relieve for a time, or temporarily."

It is perfectly manifest that the so-called "Parole Law" is in law and in fact a reprieve, and also a conditional or partial pardon and therefore in conflict with section 77 *supra*.

George, et al., Commissioners, &c., v. Lillard, Warden.

Section 253 of the Constitution provides that: "Persons convicted of felony and sentenced to confinement in the penitentiary shall be confined at labor within the walls of the penitentiary; and the General Assembly shall not have power to authorize employment elsewhere, except upon the public works of the Commonwealth of Kentucky, or when during pestilence or in case of the destruction of the prison buildings, they can not be confined in the penitentiary."

It seems to me that section 253, *supra*, is absolutely conclusive of the question. It is so plain and positive that any attempt to explain the meaning is futile.

It is not claimed in the majority opinion that the paroled person is not still a convict.

The majority opinion says that the purpose of section 253 was to prevent the working of convicts by the State outside of the prison walls, etc. But it will be seen that the State may work the convicts on public works, and it is a canon of construction that, where a number of exceptions are made, all other exceptions are absolutely prohibited or disallowed.

It seems to me that a court should never construe a constitutional provision contrary to the express language thereof.

For the reasons given, and others not necessary to mention, I respectfully dissent from all that part of the opinion which holds the so-called "Parole Law" to be valid or constitutional.

## Tunks v. Vincent.

CASE 104—CONTESTED ELECTION—JUNE 13.

## Tunks v. Vincent.

APPEAL FROM EDMONSON CIRCUIT COURT.

106	829
j112	38
106	829
e114	327
114	462
106	829
125	778
e127	168

1. **ELECTIONS—CONTEST—NOTICE.**—A notice of contest in the absence of a motion to make same more specific can not be held to be insufficient in failing to state that the contestant was eligible to the office he was contesting.
2. **SAME.**—Nor can such notice be held to be insufficient in failing to specify the names of the voters whose votes were challenged as illegal, or those who were charged to have been permitted to vote improperly.
3. **SAME—OFFICER'S RETURN IN BLANK.**—The court will not undertake to reject a precinct because the officer's return is blank as to the names of the candidates receiving the votes at that precinct for the office in contest where the return shows the number of votes cast for each party and there was but one candidate for each party for that office at that election.
4. **SAME—EFFECT OF DECISION OF THE CONTEST BOARD ON ILLEGAL VOTES.**—The decision of the contest board as to the legality or illegality of the vote cast is not final, but is subject to revision by the courts.
5. **SAME—DECISION OF THE LOWER COURT ON QUESTIONS OF FACT.**—The decision of the lower court upon the legality or illegality of a vote as depending upon a question of fact will not be disturbed without good reason, and where it appears that a vote is illegal it will be rejected whether the ballot was deposited in the ballot-box or not.
6. **SAME—EVIDENCE.**—Testimony that a voter was a Republican is competent as a circumstance bearing upon the question as to how he voted.
7. **SAME.**—A voter is a competent witness to prove how he voted and he may be compelled to testify as to how he voted unless he decline upon the ground that such testimony would incriminate him.
8. **SAME.**—The statements of a voter as to how he voted, detailed by another, are incompetent, being mere hearsay.

**SIMS & COVINGTON, MITCHELL & DuBOSE, EDWARD W. HINES**  
FOR APPELLANTS.

1. The notice of contest is insufficient, in that it fails to allege that the contestant is eligible, nor does it state that contestant is a

## Tunks v. Vincent.

- legal voter of the county. Another ground complained of is that the notice fails to specify the names of voters claimed to be illegal.
2. The election returns on their face show that appellant received a majority of the legal votes cast at this election, and there is no proof to overturn this *prima facie* case. The return from the Parker precinct is void, so far as this contest is concerned.
  3. The election officers in the Brownsville precinct failed to count for appellant one ballot he was clearly entitled to under the law, but said officers illegally destroyed said ballot without counting it for any one, and the judgment of the circuit court, did not correct this error.
  4. The election officers of the Bee Springs precinct counted for appellee five votes which he was not entitled to. Three of said votes having been cast alone for S. J. Shackelford, for clerk of the court of appeals, and two of said ballots having been cast alone for W. E. Settle, for circuit judge, but all counted for appellee, and said ballots were destroyed by the election officers; and their action in this was confirmed by the judgment appealed from.
  5. The circuit court improperly and illegally deducted two votes from the number of appellant's votes, one cast at Bee Springs precinct, and one at Capital Hill precinct, upon the ground that said votes were cast by illegal voters, to-wit, Jesse Crowley and Dick Dunn.
  6. That the circuit court heard and received incompetent testimony in this, that it allowed and received in evidence the alleged declarations of Jesse Crowley and Dick Dunn, of how they intended to and how they had voted. Also permitted Warren Strong, an officer of the election to testify concerning the marks on the ballot of Dick Dunn.
  7. That the court erred in its manner of deducting alleged illegal votes from the votes cast in the election.

## J. S. LAY FOR THE APPELLEE.

Counsel discussed mainly the questions of fact involved in the case and upon the questions of law raised by appellant, made the following citations: 6 Am. & Eng. Ency. of Law, pp. 302, 325, 337 and note 5; 338, 351, 357, 353 and note 1; McCrary on Elections (4th ed.), secs. 483, 484, 459, 479, 486, 491, 492, 493, 494; Haywood v. Beers, N. Y. Contested Election Cases, 180; Stinson v. Sweeney, 17 Nev., 309; State v. Sillon, 24 Kas., 13; Patton v. Coates, 41 Ark., 111; New Jersey Case, 1 Bart, 19; ValHindingham v. Campbell, Id., 223; Newland v. Graham, 1 Bart, 5, note; People v. Pease, 27 N. Y., 45; State v. Olin, 23 Wis., 319; State v. Craft, 18 Ore., 550; Boyer v. Teague, 106 N. C., 576; People v. Hollihan, 29 Mich., 116; Miller v. Thompson, 29 Mich., 118;

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Tunks v. Vincent.

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Duffey Re., 4 Brewst., 531 Pa.; Thompson v. Ewing, 1 Brewst., 68-9; Houston, County Judge, v. Steele, 98 Ky., 596; Major v. Barker, 99 Ky., 305.

**J. M. WILKINS ALSO FOR THE APPELLEE.**

Discussed generally the facts and upon the same propositions of law, made the following citations: 90 Ky., 55; 95 Ky., 421; 98 Ky., 576; 99 Ky., 305; 27 N. Y. Rep., 45; McCrary on Elections (4th ed.), secs. 492, 493, 494, etc.

**P. F. EDWARDS ALSO FOR THE APPELLEE.**

Cited to the same points the following: McCrary on Elections, pp. 321, 322, 277, 51; Imboden v. Cully, 94 Ky., 45.

**EDWARD W. HINES, JAMES C. SIMS, AND JOHN E. DUBOSE FOR APPELLANT IN A PETITION FOR A REHEARING.**

Before a vote can be rejected something more is required than to throw doubt upon it. The lack of qualification of the voter, and for whom his vote was counted, must be made clear by competent and legal evidence following the usual and ordinary methods of ascertaining the truth. Com. v. Barry, 98 Ky., 394; Major v. Barker, 99 Ky., 305; Ky. Stats., sec. 1571; Newcum v. Kirtley, 13 B. M., 515; Cooley Con. Lim., p. 620.

**CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.**

Appellant and appellee were opposing candidates for the office of county court clerk of Edmonson county at the regular November election, 1897. On the face of the returns, as found by the canvassing board, appellant, Tunks, was elected by one vote, and he was accordingly given a certificate of election by that board.

Appellee, Vincent, at once gave notice of contest, to which Tunks responded by demurrer to the notice, and by specific denial of the facts alleged in the notice. He also gave a counter notice, charging various irregularities in the vote received by Vincent. After preparation and final hearing, the board of contest, by the concurrence of a majority, held as had the canvassing board, and adjudged in favor of Tunks. On appeal by Vincent the regular circuit judge

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Tunks v. Vincent.

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deemed himself disqualified by reason of having been a candidate at the same election, and an agreement was made by which the case was heard and determined by a special judge, the Honorable C. U. McElroy, who, in an able and elaborate opinion, held that Vincent was entitled to the office.

The first question to present itself is that raised by the demurrer. The notice is said to be insufficient (1) because it does not state that Vincent was eligible to the office he was contesting; and (2) because it is indefinite, and fails to specify the grounds relied on. It was held by the learned judge below that the notice was indefinite, but, in the absence of a motion to make more specific, it should be held sufficient. The notice is to the effect that Tunks, who is averred to be the Republican candidate for the office, whilst the contestant, Vincent, was the Democratic candidate for the same office, did not receive, but that Vincent did receive, a majority of the legal votes cast in the county of Edmonson at the election of November 2, 1897, and that, receiving such majority, he (Vincent) was duly and legally elected clerk of the Edmonson county court. Before passing to a consideration of other terms of the notice, we may say here that we regard the foregoing specifications of the notice as substantially meeting the objections first above indicated.

In *Ledbetter v. Hall*, 62 Mo., 423, it was said that, even if it was necessary to allege eligibility, the statement in the notice that the contestant has been duly and legally elected to the office in controversy, necessarily implied his eligibility for the official position. This is substantially the effect of the decision of this court in *Collopy v. Cloherty*, 95 Ky., 330, [25 S. W., 497.] (See cases to same effect in 7 Enc. Pl. & Prac., 381, notes 5, 6.)



## Tunks v. Vincent.

We are to bear in mind also that the statement that contestant was a candidate of one of the political parties has force in view of our election laws providing for party nominations. When one is such a candidate, he must be presumed to be entitled to have his name go on the official ballot and is *prima facie* eligible to the office for which he is a candidate. The mere averment of his candidacy under these circumstances implies eligibility. *Edwards v. Knight*, 8 Ohio, 375; *Batterton v. Fuller* (S. D., 1894), [60 N. W., 1071.]

Continuing, the notice charged that the precinct officers of the election permitted divers illegal votes to be cast for Tunks and against Vincent as follows: Twenty-five at Parker precinct, twenty at the Capital Hill precinct, etc., and that at the Fork and Bee Spring precincts especially the officers illegally counted to Tunks and against Vincent about ten votes that did not vote for either Tunks or Vincent; that the officers refused to allow about ten legal voters to vote who would have voted for Vincent had they been allowed to vote; and that Vincent had lost six votes at the Fork and Parker precincts because the officers there refused to count for him all the legal votes cast for him at those precincts.

Our statute provides that "the notice shall state the grounds of the contest, and none other shall afterwards be heard as coming from such party." Kentucky Statutes section 1535, subsection 1.

We are of opinion that the notice in question does state the grounds of the contest within the meaning of the statute. The object of the notice is, of course, to put the contestee upon a proper defense, and prevent any surprise being practiced upon him; and, whilst it would have been

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Tunks v. Vincent.

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incumbent on the contestant, at the time he gave his notice, to give the names of illegal voters if he knew them, he was not asked to make his notice more specific.

In discussing the sufficiency of such notice under a Federal law which required that the contestant should, within thirty days after the election, "give notice in writing to the member whose seat he intends to contest, and in such notice shall specify particularly the grounds on which he relies." Judge McCrary, in his work on Elections (section 394), says: "It seems to be settled by the decisions of the House of Representatives that a notice is good under the law if it specify the number of illegal votes polled, for whom polled, and when and where polled, without specifying the names of the illegal voters." And the learned author, continuing, says, "The same rule prevails in cases brought under statutes providing for the contest of elections;" citing the cases of *Gibbon v. Shepard*, 65 Pa. St., 36; *Batturns v. Megary*, 1 Brewst. 162; *Doerslinger v. Hilmantel*, 21 Wis., 574.

The statute requires the grounds merely of the contest, and not the evidence in support thereof. And so we may say, in this connection, that, although we find much in the record and in the argument for contestant in support of the rejection of certain alleged illegal ballots counted for contestee, there is nothing in the notice apprising appellee of such a ground of contest. We think the demurrer to the notice was properly overruled.

Disposing of Tunks' counter notice first, and which does rely on defective ballots and returns as well, it appears that at the Parker precinct the officers made out their return in the usual form, except they failed to fill in the blanks provided for the names of the various candi-

## Tunks v. Vincent.

dates; that is, the returns were made saying that the candidate for county judge, candidate for county clerk, and the various other candidates voted for received the number of votes certified to and set opposite their names; but the names of the various candidates were not given. It is therefore insisted for Tunks that that precinct be excluded entirely. The trial court, as to this, said: "As there was only one Republican candidate and one Democratic candidate for county clerk and county judge, I take it there can be no reasonable doubt about the fact that the ninety-eight votes returned for the Republican candidate for judge and the Republican candidate for clerk, respectively, and the 182 votes returned, respectively, for the Democratic candidates for county judge and county clerk, were intended for Dorsey and Tunks, and for Edwards and Vincent, and I am unwilling, therefore, to throw that precinct out."

We think this conclusion is sound, and is supported by ample authority. 10 Am. & Eng. Enc. Law, 732 and notes.

The trial court reached its conclusion that Vincent was elected by holding that out of thirty-four Tunks votes attacked by Vincent two of them were illegal votes, because the voters were not qualified electors under our statute. This elected Vincent by one vote, and left the Republican candidate for county judge, whose election was contested by his opponent, elected by three votes, instead of five, as found by the canvassing board. The latter contest was heard on the same proof and record, but from this finding there is no appeal.

It is insisted for appellant, at the threshold, that under our election system there can be no inquiry as to the casting of illegal votes, because the action of the precinct officers is final. We can not think so. The question in

all election cases is, which candidate has received the highest number of legal votes; and, except so far as the investigations of judicial tribunals on his behalf is restricted by positive mandate, the usual and ordinary methods of ascertaining the truth should be followed; and, where it can be done, every illegal vote should be thrown out. The two votes rejected by the lower court were those of Dick Dunn and Jesse Crawley. The proof as to the legality of each of these votes is conflicting, and we find no good reason for disturbing the findings of fact as certified by the trial judge. The preponderance of the proof is that Dunn was not a resident of the precinct when he voted, and, if Crawley was,—which is doubtful,—it is clear he was under twenty-one years of age at that time. A more difficult question is presented when we see to ascertain for whom Crawley voted. As to Dunn, there is no difficulty. His vote was challenged, and, whilst he was permitted to vote, his ballot was not put in the ballot box. It was preserved until the close of the election, and then counted for Tunks. The testimony as to this is uncontradicted, and we think it is competent. Dunn was an illegal voter, and the law as to the secrecy of the ballot can not be invoked to protect his ballot. As aptly held by the learned judge below, an illegal vote is no vote, and if it gets in the poll books and in the returns, it should be stricken out whenever it can be ascertained by sufficient and competent evidence; and it should be taken from the candidate who received it whenever that fact can be made clearly to appear by competent and legal evidence. As Dunn was an illegal voter, the uncontradicted testimony as to how he voted is competent, and his vote was therefore deducted from Tunks' total vote. We have seen that Crawley was an illegal voter, but when we

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Tunks v. Vincent.

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come to ascertain how he voted an interesting question is presented. He was introduced as a witness for Tunks, and testified on cross-examination that he was a Republican, this being his first vote. When asked for whom he voted, he expressed a willingness to answer, but counsel for Tunks objected, and told him not to answer. He then declined to answer. It was shown by other testimony, the competency of which challenged, that he said before he voted that he intended to vote the Republican ticket except in one particular, not important here, and, after the election, that he had so voted. Several witnesses so prove, and Crawley in no way contradicts their statements.

We regard the proof that the witness was a Republican as competent testimony, and, further, that he was himself a competent witness to prove how he voted, and might be compelled to testify as to how he voted, unless, indeed, he declined upon the ground that such testimony would incriminate himself. Judge McCrary, in his work on Elections (3d Ed., sections 457-459), very clearly lays down this rule as supported by the authorities. He concluded by saying: "It is very clear that the rule which, upon grounds of public policy, protects the legal voter against being compelled to disclose for whom he voted, does not protect a person who has voted illegally from making such disclosure. To give to that rule this wide scope, would be to make it shield the right and the wrong, the honest and the dishonest." The witness offered to answer the question as to how he voted, and was prevented only by the objection of Tunks; and this, in connection with the proof that he was a Republican, would seem to afford *prima facie* grounds for concluding that he voted for Tunks. Mr. McCrary, in sec-

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Johnson v. Mason Lodge No. 33, I. O. O. F.

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tion 458, says: "And when a voter refuses to disclose or fails to remember for whom he voted, it is competent to resort to circumstantial evidence to raise a presumption in regard to that fact," citing *People v. Pease*, 27 N. Y., 45, [84 Am. Dec., 242], and *Cushing's Am. Parl. Law*, sections 199, 210; and the same author says it is also competent to prove that the alleged voter was an active member of a particular political party, or obtained his ballot from a person supporting a particular candidate or ticket. We are not inclined to follow what may be conceded to be the rule approved by a preponderance of authority, to the effect that *Crawley's* declarations as to how he voted are competent. We think these statements are mere hearsay. As we have seen, however, there is enough testimony to show that this vote was an illegal one, and that *Tunks* got the benefit of it, and the trial court committed no error in subtracting it from appellant's vote. It is not necessary to review the action of the court in declining to reject other alleged illegal votes said to have been counted for appellant.

The judgment is affirmed.

JUDGES GUFFY AND DURELLE DISSENT.

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CASE 105—ACTION ON NOTE—JUNE 13.

Johnson v. Mason Lodge No. 33, I. O. O. F.

APPEAL FROM MASON CIRCUIT COURT.

1. CORPORATIONS—ORGANIZED FOR CHARITABLE PURPOSES.—Section 833 of the Kentucky Statutes which excepts corporations organized for charitable purposes from the general provisions applicable to corporations is not limited to corporations organized under the act of which that section is a portion, but is applicable alike

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109 837

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Johnson v. Mason Lodge No. 33, I. O. O. F.

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to all corporations of such character, whether they were organized previously to the passage of the law or subsequently thereto.

2. SAME—ESTOPPEL BY DEALING WITH A CORPORATION.—A person who borrows money from a corporation and executes his note therefor is estopped to deny the legality of the transaction when sued on the note.

E. L. WORTHINGTON FOR THE APPELLANT.

1. Section 571, Kentucky Statutes, makes it illegal for a corporation to transact any business without complying with its requirements, and no recovery can be had on a contract which it was unlawful for it to make. *Vanmeter v. Spurrier*, 94 Ky., 22; *Vannoy v. Patton*, 5 B. Mon., 248; *Franklin Ins. Co. v. Louisville, &c., Packet Co.*, 9 Bush, 590; *Farrior v. New England Mortgage Co.*, 88 Ala., 275; *Cary Lombard Co. v. Thomas*, 92 Tenn., 587; *Stevenson v. Ewing*, 87 Tenn., 46; *Cincinnati Mutual Health Assurance Co. v. Rosenthal*, 55 Ill., 85; *Thorne v. Travelers Ins. Co.*, 80 Penn. St., 15; *Dudley v. Collier*, 13 Am. St. Rep., 55; *Cooper Mfg. Co. v. Ferguson*, 113 U. S., 727; *Edison Gen. Electric Co. v. Canadian Pac. Co.*, 24 L. R. A., 315, and notes; *Benjamin on Sales*, sec. 538; *Clark on Contracts*, 385; *Pollock on Contracts*, 262.
2. The rules applicable to *ultra vires* contracts do not apply to illegal contracts. The words "ultra vires" and "illegality" represent totally different and distinct ideas. 27 Am. & Eng. Ency. of Law, pp. 352, 378; *Bissell v. Michigan Southern R. Co.*, 22 N. Y., 258; *Whitney Arms Co. v. Barlow*, 20 Am. Rep., 504; *Franklin Nat. Bank v. Whitehead*, 63 Am. St. Rep., 302; *Central Transp. Co. v. Pullman Co.*, 139 U. S., 24; *California Bank v. Kennedy*, 167 U. S., 362.

I. W. ROBERTSON ON THE SAME SIDE.

1. The appellee is a corporation embraced in and affected by the requirements of the statutes. (Secs. 571 and 883.)
2. The statute was intended to establish and maintain an object of public policy.
3. The penalty imposed by the statute is a recurring penalty repeated as often as any dealings or business is done by a corporation before it has complied with the requirements thereof, and the performance of said requirements is a condition precedent to a corporation's power and authority to do any business.
4. The intention of the statute is to prevent the doing of any and all business, to prohibit dealings and contracts, and to render such illegal and void and therefore not enforceable, unless the requirements of the statute have been performed.

Johnson v. Mason Lodge No. 33, I. O. O. F.

Citations: Ky. Stats., secs. 571, 883; Franklin Ins. Co. v. Louisville, &c., Packet Co., 9 Bush, 590; Vanmeter v. Spurrier, 94 Ky., 22; Benjamin on Sales, vol. 2, p. 712; Farrior v. New England Mortgage Sec. Co., 88 Ala., 275; s. c. 7 Sou. Rep., 200.

L. W. GALBRAITH FOR THE APPELLEE.

1. To forfeit contract in this case would be an additional punishment; but section 571, Kentucky Statutes, does not apply to charitable corporations such as appellee. *Fritts v. Palmer*, 132 U. S., 289; Ky. Con., sec. 194; Ky. Stats., secs. 571, 883, 882.
2. When the language of a statute leads to hardships or injustice presumably not intended by the Legislature, a construction will be put upon it which modifies the meaning of the words. *Endlich on Int. of Stats.*, sec. 295.
3. Appellant, to make good his defense, must, by the statements of his answer, bring appellee clearly within the statute. *Murfree on Foreign Corporations*, sec. 98.
4. Even though section 571, Kentucky Statutes, applies to appellee, the contract is not void.
5. The business done by a corporation in violation of the Kentucky Statute is not unlawful, but the corporation is subjected to a fine for doing it. *Lindsey v. Rutherford*, 17 B. M., 245.
6. The cases of *Vannoy v. Patton*, 5 B. Mon., 248, and *Franklin Ins. Co. v. L. & C. Packet Co.*, 9 Bush, 590, relied on by appellant as showing that a penalty implies a prohibition, each turns on the business itself being immoral or against public policy. *Washburn Mill Co. v. Bartlett* (N. D.), 54 N. W. R., 544.
7. If the Legislature had intended to make contracts of corporations doing business in violation of the statute void, it would have said so. *Bank v. Matthews*, 98 U. S., 628.
8. The penalties fixed by the Kentucky Statutes, and similar ones, are exclusive of any other, and contracts made in contravention of these statutes are valid; and this is to be inferred from the fact of the penalty, which indicates that the Legislature depended on it as the remedy. *Toledo Tie & Lumber Co. v. Thomas*, 32 W. Va., 566; *Morawetz on Private Corporations*, vol. 2, sec. 665; *Thompson's Com. on Private Corps.*, vol. 6, sec. 7968; *Fritts v. Palmer*, 132 U. S., 282; *Garratt Ford Co. v. Vermont Mfg. Co.* (R. I.), 37 Atl. Rep., 948; *McBroom v. Scottish Investment Co.*, 153 U. S., 318; *Jarvis-Conklin Mortgage Trust Co. v. Willhoit*, 84 Fed. Rep., 514; *Chattanooga R. & C. R. Co. v. Evans*, 66 Fed. Rep., 809; *La France, &c., Co. v. Mt. Vernon*, 9 Wash., 142; *Rockford Ins. Co. v. Rogers*, 47 P., 848; *Fairbanks, Morse & Co. v. Macleod*, 45 P., 282; *Kindel v. Beck & Pauli Lithographing Co.*, 35 P.,



- 538; Dearborn Foundry Co. v. Augustine (Wash.), 31 P., 327; Helvetia Swiss Fire Ins. Co. v. Edward P. Allis, 53 P., 242; Edison Elec. L. Co. v. Canadian P. N. Co., 40 Am. St. Rep., 910; Union, &c., Ins. Co. v. McMillen, 24 O. St., 67; Pennypacker v. Capital Ins. Co., 80 Iowa, 56.
9. If by failure to comply with the statutes appellee is incompetent to contract, the contract is only voidable and can not be attacked collaterally. Bank v. Whitney, 103 U. S., 101; Foster v. Betcher Lumber Co., 5 S. D., 57; Wright v. Lee, 2 S. D., 596; 4 S. D., 287.
10. Any one dealing with a corporation and contracting with it as such is estopped to deny its existence. Ky. Stats., sec. 566; Jones v. The Bank of Tenn., 8 B. M., 123; Bank of Gallipolis v. Trimble, 6 B. M., 601; Henderson & Nashville R. R. Co. v. Leavell, 16 B. M., 363; Lall v. Mt. Sterling Coal Road Co., 13 Bush, 32; Thompson's Com. on Private Corps., secs. 518, 7647, 5274.
11. Where a party has received and retains benefits as a loan of money from a corporation on contract, he can not, in an action against him on the contract, plead a want of power on the part of the corporation either on account of the contract's being *ultra vires* or failure to comply with the statutory requirement prerequisite to the exercise of corporate functions, or illegality of the contract. Manchester & L. R. R. v. Concord R. R. Co., 20 Atl., 383; Thompson's Com. on Private Corps., secs. 6015, 6021; Cook on Corps., sec. 690; Herman on Estoppel and *Res Adjudicata*, sec. 1254; Bigelow on Estoppel, 464; Wright v. Lee, 2 S. D., 956; Sherwood v. Alvis, 83 Ala., 115; Rockford Ins. Co. v. Rogers, 47 P., 848; Ray v. Home & Foreign Agency Co., 26 S. E. R., 56; Rathbone, Sard & Co. v. Frost, 37 P., 298 (Wash.); Continental Tr. Co. v. Toledo, St. L. and K. C. R. Co., 82 Fed. Rep., 642; Continental Ins. Co. v. Richardson, 72 N. W. R., 458; Stout, &c., v. Zulieh, 7 Atl., 362; Erb v. Yoerg, 67 N. W. R., 355; Snider Sons Co. v. Troy, 91 Atl. Rep., 224; Andes v. Ely, 158 U. S., 312; 7 Am. & Eng. Ency. of Law, 668 (2d ed.); Thompson's Com. on Private Corps., sec. 6040; Beach on Modern Law Contracts, sec. 1451 and note; Morawetz on Private Corps., sec. 721; Central Tr. Co., of N. Y. v. Ohio Cent. R. R. Co., 23 Fed. Rep., 306; Western U. Tel. Co. v. Union Pac. Ry. Co., 3 Fed. Rep., 423; Greene v. Southworth, 2 Ky. Law Rep., 233.
12. The courts which refuse to apply the doctrine of estoppel to a case like this are either hampered by statutory restrictions or are holding to the harsh doctrine of the earlier cases. Thompson on Private Corps., sec. 5712.

## JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.

Appellee alleges that it is duly incorporated under the laws of this Commonwealth, with power to contract and be contracted with; that the appellant, Johnson, borrowed from them the sum of \$750, for which he on the same day executed and delivered to them his promissory note, by which he agreed to pay them the sum loaned, with interest, on demand; that he paid thereon \$52.50 August 17, 1897, and that demand had been made for the balance of the debt, and payment refused.

Appellant, in his answer, admits the execution of the note sued on, and that it was for borrowed money, but seeks to evade the payment thereof on two grounds: First, he denies the corporate existence of appellee; and, second, he states that at the time the note sued on was executed, and for several years prior thereto, appellee had been engaged in the business of lending money and trafficking in property for profit in this State; that its residence is and had been in Mason county; and that at the time of the execution of the note sued on and of the commencement of this suit appellee had not filed with the Secretary of State a statement giving the location of its office, and the name of its agents upon whom process could be served, as required by section 194 of the Constitution and section 571 of the Kentucky Statutes, and for this reason the obligation sued on was illegal and unenforceable.

A general demurrer was sustained to this answer, and, appellant declining to amend, judgment was rendered in favor of appellee for the amount sued for, from which this appeal is prosecuted.

Section 194 of the Constitution reads as follows:

"All corporations formed under the laws of this State,

or carrying on business in this State, shall, at all times, have one or more known places of business in this State, and an authorized agent or agents there, upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section."

And the section of the statute relied on provides that:

"All corporations except foreign insurance companies formed under the laws of this . . . State, and carrying on any business in this State, shall at all times have one or more known places of business in this State, and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State, a statement, signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served; . . . and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense." It is claimed by appellee that as it is a purely charitable institution, without capital stock, or organized for pecuniary profit, it is not subject to any of the laws relating to corporations organized for the purpose of gain, and rely to support this claim upon section 883 of the Kentucky Statutes, which reads as follows:

"Corporations, associations or societies organized under this act shall not be subject to any of

**Section 506 of the Kentucky Statutes provides that:**

"No corporation organized under this chapter shall be permitted to set up or rely upon the want of legal organization as a defense to any action against it, nor shall any person, transacting business with such corporation, or sued for injury done to its property be permitted to rely upon such want of legal organization as a defense."

And this provision of the statute only announces the common-law principle which has been repeatedly recognized by former adjudications of this court.

In the case of *Henderson & Nash. Railroad Co. v. Leavell*, 16 B. Mon., 363, the court said: "In general, where a defendant deals with a corporation, and recognizes its existence, he is not permitted to raise the question whether it has been legally organized or not."

In the case of *Wright v. Shelby Railroad Co.*, 16 B. Mon., 4 [63 Am. Dec., 522], the court said:

"Whether an incorporated company has been regularly organized, so as to give it power to act, can not be inquired into in a collateral, but must be asserted in a direct proceeding against the incorporation."

The same doctrine was announced in 5 Litt., 635. And it has been repeatedly held by this court that by executing a note payable to a corporation the payor is estopped to deny its existence or authority to do business at that time. See 1 J. J. Marsh, 380; 6 B. Mon., 601; 8 B. Mon., 123, [46 Am. Dec., 540].

Under these cases we think the appellant is clearly estopped from denying the corporate existence of appellee, or of pleading any disability to contract existing at the time the note was given; and they are in harmony with the decisions of other courts and the doctrine of the leading text writers. See *Andes v. Ely*, 158 U. S., 312, [15 Sup. Ct., 267;] *Close v. Glenwood Ceme-*

tery, 107 U. S., 466, [2 Sup. Ct., 267]; *Andrews v. Pipe Works*, 23 C. C. A., 454, [77 Fed., 774]; *Sniders' Sons' Co. v. Troy*, 91 Ala., 224, [24 Am. St. R., 887, 8 South, 658], citing 4 Am. & Eng. Enc. Law, (1st Ed.), 198; *Shasta Bank v. Boyd*, 99 Cal., 604, [34 Pac., 337]; *Plummer v. Struby-Esterbrook Mercantile Co.*, 23 Colo., 190, [47 Pac., 294]; *Hickox & Read Pub. Co. v. Dawes Mfg. Co.*, 64 Ill. App., 630; *Hause v. Mannheimer* (Minn., 1897), [69 N. W., 810]; *Bradley v. Reppell*, 133 Mo., 545, [54 Am. St. R., 685, 32 S. W., 645, and 34 S. W., 841], citing 4 Am. & Eng. Enc. Law, (1st Ed.), 198.

Mr. Cook, in his work on Corporations, says:

"A person who borrows money from a corporation can not defeat an action for the money by alleging that the corporation had no power to make the loan. He must pay back the money."

Bigelow on Estoppel, section 464, says:

"In ordinary cases it is not allowed an individual to escape his obligation by showing the incapacity of the other party to the contract to act as he had assumed to act. We have elsewhere seen that this is a broad rule of law, and it is quite as true of persons liable in a contract to corporations as in other cases."

Thompson's Commentaries on Private Corporations, section 5274, says:

"The modern doctrine is coming to this: That one who enters into a contract with a corporation is, when sued by the corporation upon such contract, estopped to deny that the corporation had power to make the contract. The obvious reason of the rule is that a person ought not to be

allowed to oppose such a dishonest defense to a bargain which is fair so far as he is concerned. The rule of public policy, which aims to keep corporations within the limits of their chartered powers, yields to the justice of the particular case, and the wrong which the corporation has done to the public by transcending its powers is left to be redressed in a public prosecution against the corporation. Hence, if a national bank lends money on the security of a mortgage or of a non-negotiable note, the obligor in the contract, when proceeded against to enforce it, can not escape the payment of the debt which he has thus contracted by pleading that the bank had no power to make the contract." And in section 6021, the same author says:

"Where the corporation is plaintiff in the action, and is seeking to enforce a contract into which it had no power to enter, if the defendant has received the benefit of the contract he will not be allowed to defend on the ground that it was *ultra vires*, until he restores the benefits which he received. The simplest illustration of this is where a corporation has exceeded its power in lending its money on a promissory note, but nevertheless seeks to get its money back by bringing an action on the note. Here the maker of the note will not be heard to defend on the ground that the corporation had no power to lend him the money."

And in section 5712, the same author said:

"Those decisions which upheld the rascally borrower in keeping the money which he had borrowed from the corporation, on the ground that the corporation had no power to lend it,—the very reason why he ought to be compelled to restore it,—form strange blots upon the pages of American jurisprudence. If a collection of individuals, having no corporate powers at all, lend their money, and take a promissory

note as evidence of the debt, in which they describe themselves as a corporation, then, when they sue the borrower upon the note, he is estopped, under theories prevailing in all American jurisdictions, from setting up the defense that they are not a corporation. Yet, according to these decisions, while he can not plead that they are not a corporation he can plead that they do not possess the power to lend their money, and he can plead this as a justification for his keeping it."

But it is insisted for appellant that this doctrine has no application to the questions involved here, for the reason that the contract sued on is not simply *ultra vires*, but is actually forbidden by the statute, and is contrary to public policy; that the cases of *Vanmeter v. Spurrier*, 94 Ky., 22, [21 S. W., 337], and *Vannoy v. Patton*, 5 B. Mon., 248, support this doctrine.

In the case of *Vanmeter v. Spurrier* the statute under consideration was one to protect the public against worthless fertilizers, and the case of *Vannoy v. Patton* from the sale of liquor without license; and the case of *Franklin Ins. Co. v. Lou. & Ark. Packet Co.*, is, we think, in line with these; the vice was in the contract itself, and they are therefore distinguished in this respect from this case, which only involves the idea of disability to sue; and it appears to us that the defenses relied on in this case are inconsistent, and neither of them tenable.

For reasons indicated, the judgment is affirmed.



CASE 106—ACTION FOR DAMAGES FOR PERSONAL INJURY—  
JUNE 13.Louisville & Nashville R. R. Co. v. Brantley's  
Administrator.

## APPEAL FROM CHRISTIAN CIRCUIT COURT.

**LIMITATION—DEATH OF PERSON INJURED.**—A cause of action for suffering accruing to one for personal injury survives to his personal representative and limitation does not cease to run upon the death of the person injured. If no personal representative qualified until the lapse of a year from the injury the cause of action becomes barred. If, however, a personal representative qualify before the bar is complete the statutory period of limitation is extended one year from the qualification.

B. D. WARFIELD IN A BRIEF AND SUPPLEMENTAL BRIEF FOR APPELLANT.  
(H. W. BRUCE AND JOE MCCARROLL OF COUNSEL.)

The judgment below should be reversed for the following reasons:

1. Because the petition did not state a cause of action against the appellant, and for that reason the court should have carried the demurrer to the second and third paragraphs of the answer back to the petition, and sustained it to the petition.

2. Because the court erred in sustaining the demurrer to the second and third paragraphs of the answer. In sustaining the demurrer to the second paragraph of the answer, the court necessarily held that any of the actions mentioned in section 3, article 3, chapter 71, General Statutes, might be brought at any time within twenty-one years after the death of the person to whom they had accrued, if he died before commencing such action and the qualification of his personal representative was delayed, as it might lawfully be, for the period of twenty years, lacking a day. And this court can not affirm the judgment of the lower court without holding that such construction of the law is correct.

3. Because the court erred in permitting appellee's witness, Higdon, to testify to matters which were immaterial, irrelevant, and highly prejudicial, and to which testimony appellant objected and excepted at the time.

4. Because the court erred in refusing to instruct the jury

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Louisville & Nashville R. R. Co. v. Brantley's Admr.

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peremptorily to find for the appellant at the close of appellee's evidence.

5. Because the court erred in refusing to instruct the jury peremptorily to find for the appellant at the close of all of the evidence.

6. Because the court erred in the instructions it gave to the jury, particular instructions "1," "2," "4" and "C," and each of them.

7. Because the court erred in refusing to give to the jury instructions offered by appellant, and, more especially, because of the refusal to give instruction "G" so offered.

8. Because the verdict of the jury is flagrantly against the evidence, is not sustained by the evidence, and is contrary to law.

9. Because the verdict of \$5,000 for "pain and suffering" endured by the deceased, the proof of his physicians showing that deceased was kept under the influence of opiates, and that he did not suffer much, is excessive, appearing to have been given under the influence of passion or prejudice.

Citations: L. & N. R. R. Co. v. Brantley's Admr., 96 Ky., 297; Genl. Stats., sec. 43, art. 2, ch. 39; Hansford's Admr. v. Payne & Co., 11 Bush, 380; Connor's Admr. v. Paul, 12 Bush, 145; Genl. Stats., sec. 3, ch. 57; Henderson's Admr. v. Ky. C. R. Co., 86 Ky., 389; Jordan's Admr. v. C., N. O. & T. P. Ry. Co., 89 Ky., 40; L. & N. R. R. Co. v. Long, 94 Ky., 421; Bogenschutz v. Smith, 84 Ky., 340; Embry v. L. & N. R. R. Co., 36 S. W. R., 1123; Revised Stats. of Indiana, secs. 284, 293; Wile v. Sweeney, 2 Duv., 161; Young v. Duhme, 4 Met., 239; Martin v. McDonald, 14 B. M., 440; Mitchell v. Vance, 5 Mon., 528; Birney v. Hann, 3 A. K. M., 322; Macklin v. Trustees, &c., 83 Ky., 598; Standard Oil Co. v. Tierney, 92 Ky., 377; Beems v. Chicago, &c., R. Co., 26 Iowa, 363; P. R. Co. v. Roy, 102 U. S., 460; 1 Sedgwick on Measure of Damages, 641; 2 Thompson on Negligence, 1263; Brown's Admr. v. L. & N. R. R. Co., 97 Ky., 237; 1 Mon., 170; 3 Dana, 566; 11 Bush, 276; 13 Ky. Law Rep., 554; 14 Ky. Law Rep., 559; Genl. Stats., sec. 3, art. 3, ch. 71; Same, sec. 3, art. 4, ch. 71; Hanna v. Jeffersonville R. R. Co., 32 Ind., 113; L. E. & St. L. Ry. Co. v. Clarke, 152 U. S., 230; Fowlkes' Admr. v. N. & D. R. Co., 9 Heiskell, 831; Trafford v. Adams Express Co., 8 Lea, 96; Hansford's Admr. v. Payne & Co., 11 Bush, 380; Conner v. Paul, 12 Bush, 144.

EDWARD W. HINES, BREATHITT & FOWLER, CULLOP & KES-SINGER FOR THE APPELLEE.

• (Brief not in the record.)

Louisville & Nashville R. R. Co. v. Brantley's Admr.

EDWARD W. HINES FOR THE APPELLEE IN A PETITION FOR A REHEARING. (BREATHITT & FOWLER, CULLOP & KESSINGER OF COUNSEL.)

The construction given by the court to section 2526 of the Kentucky Statutes is one which defeats its prime object. A comparison of that section with the section of the Revised Statutes for which it was substituted will show that it was the intention of the Legislature to be more liberal to the plaintiff in the matter of time than was the statute in force before the enactment of the General Statutes. Revised Stats., sec. 3, art. 4, ch. 63; Genl. Stats., sec. 3, art. 4, ch. 71; Ky. Stats., sec. 2526; 2 Wood Limitations, appendix. The statute of limitations is always more favorable to sureties than to principal debtors and yet section 2552, Kentucky Statutes, provides that this limitation as to a surety "shall not apply to so much time elapsed when there was no executor, administrator or other person authorized to commence an action." See further *Samm's, &c., v. Wightman*, 31 Fla., 35; *Mowry v. Hays*, 18 R. I., 523; *Brewster v. Brewster*, 52 N. Hamp., 52; *Bates v. Kempton*, 7 Grey, 382; *Cov. & Lex. R. R. Co. v. Bowler, &c.*, 9 Bush, 468; *Daughla v. De la Guerra*, 10 Cal., 387; *Strain v. Babb*, 30 S. W. R., 342; *Riner v. Riner*, 45 Am. St. Rep., 694.

WALKER D. HINES FOR THE APPELLANT IN RESPONSE TO A PETITION FOR A REHEARING.

Limitation against the cause of action commenced to run in Brantley's life time and was completely barred before the personal representative qualified. Ky. Stats., sec. 2526.

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

In July, 1891, John L. Brantley, while in the service of the appellant, received injuries from which he died within a few hours. In May, 1895, this action was brought by his administrator for damages to his intestate by reason of his pain and suffering. The statute of limitations was pleaded, but held by the trial court not to apply, and this is the controlling question in the case. It will be seen that some three years and ten months elapsed from the accrual of the cause of action until the institution of the suit, whereas the section under which the limitation in such actions is fixed provides as follows: "An action

for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle or stock by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, arrest, seduction, criminal conversation or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process, shall be commenced within one year next after the cause of action accrued, and not thereafter." General Statutes, chapter 71, article 3, section 3; Kentucky Statutes, section 2516.

The words "and not thereafter" are not found in the corresponding section of the Revised Statutes fixing the limitation of the actions indicated above, and it is contended they were added for the express purpose of precluding the application of the following provision of the General Statute: "If a person entitled to bring any action mentioned in the third article of this chapter dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, the action thereon may be brought by his representative after the expiration of that time, if commenced within one year after his qualification." General Statutes, chapter 71, article 4, section 3; Kentucky Statutes, section 2526.

The "third article" referred to in the section last quoted contains numerous provisions as to the limitation of actions other than the provision fixing the limitation of actions for personal injuries, malicious prosecution, etc.; and it is said there is therefore ample room for the operation of section 3, article 4, as to the limitation of actions. The words "and not thereafter" do not occur in any other of these sections of article 3, and the

nature of the actions in these other sections are not such as to demand so speedy a settlement of the issues of the suit, if any were to be instituted.

Inasmuch as it is permissible under our statutes to grant original administration during a period of twenty years after the death of the testator or intestate, the application of the section last quoted to the causes of action mentioned in section 3, article 3, would give, it is argued, a right of action for personal injuries, injuries to cattle, etc., for a period of twenty-one years from the accrual of the cause of action. We can not believe that the Legislature intended to elongate the time for bringing actions on demands of the character indicated to such an unreasonable period. But whether the words "*and not thereafter*" were added to the section for the purpose of making the limitations as to these actions an exception to the provisions of the subsequent section is at least very doubtful.

In *Carden v. L. & N. Railroad Co.*, (March 25, 1897), [39 S. W., 1027], this court held that, when the action was for the death of the person, the limitation was one year, under the section we have first quoted, and being the same section which controls in this case. The court said in that case: "It is admitted by plaintiff that if the cause of action had accrued to his intestate in her lifetime, the running of the statute would not be stayed by her death until the grant of administration, but, having begun, would have continued; and it is not easy to see why, on principle, any distinction should be made between the case where cause of action accrued in the lifetime of an intestate and where it does not accrue until after her death. The only reason that can be given why the statute should

not run in any case is that there is no person to sue, and no person to whom laches can be imputed. But it seems to us that the reason applies to the one case as well as to the other, and, if an exception is allowed in favor of the one, it ought to be extended to the other."

From necessity and the reason of the thing, the statute of one year was applied in the Carden case, although logically, as must be admitted, the cause of action did not accrue until after the death of the intestate; and it never accrued to the deceased at all, but to the personal representative. There is no such difficulty in applying the statute in the present case. The cause of action confessedly accrued to the injured person in his lifetime, and confessedly, too, his death did not stop the running of the statute. But, while the addition of these words "and not thereafter" might seem significant as argued, and might, indeed, be held sufficient, if absolutely necessary, to support appellant's contention that the same period of limitation was intended to be prescribed in actions growing out of the same transaction, yet in view of a construction of the two sections, to be suggested presently, which accomplishes the same result substantially, we do not feel authorized to give the words quoted the importance contended for. To do so would certainly lead us to ignore entirely the provisions of the last section, if they are held to apply; and that they do apply can hardly be denied. It seems to us, however, that the true meaning of the sections, when taken together, is plain enough. Under the first section quoted the limitation is one year from the injury. The death of the injured party does not stop the running of the statute; therefore, unless a personal representative shall qualify within one year from the injury, the action is barred. If he does so qualify, he is given

another year within which to bring the action. The last section is entirely silent as to when there is to be a qualification. It permits the personal representative to *bring his suit* after the first year is out, but it in no way affects the question as to when he is to qualify in order to stop the running of the statute. As we have already seen, the bar is complete unless there is a qualification within a year from the accrual of the cause of action. Taking the two sections together, there is, we believe, no difficulty whatever as to the meaning. As we have seen, the death does not stop the running of the statute. This is held in an unbroken line of decisions. Without a qualification, then, the bar is complete. Therefore the qualification, to be effectual, *must* be within the year, and that, being within the year, the suit may be brought, as the last section says, after the expiration of the year, if commenced within one year after the qualification. No suit can be maintained by one who has waited until the bar is complete before bringing his action. Only his qualification within the year stops the statute from running, and this does stop it under the last section, because the moment he qualifies, that section interposes to give him another year in which to sue.

This action is barred by time, and the case is remanded for judgment accordingly.

Finley, Secretary of State, v. Stone, Auditor.

July 1, 1893, was approved an act of the following title: "An act to amend an act, entitled 'An act providing for the creation and regulation of private corporations.'"

Various amendments were made by that act to the act of April 5, 1893. Section 271 was amended by a provision that banks and trust companies should pay for each report made to the Secretary of State, two dollars and fifty cents, and that such reports should be filed in the office of the Secretary of State, as other public documents. But section 272 was amended by simply striking out of that section the word "article," and inserting in lieu thereof the word "chapter;" but in every other respect section 272, as amended, read like the original section.

It is manifest that according to the language and meaning of section 1 of the act of April 6, 1893, it was intended that the Secretary of State, until the first Monday in January, 1896, should receive the fees and compensation then allowed by law, which included the sum of \$1,000, which was provided for in section 272 of the act of April 5, 1893. But the intention is equally manifest that thereafter he should only receive an annual salary of \$3,000, for the words "and no fees or perquisites" were evidently intended to exclude any other or additional compensation.

The act of April 5, 1893, though it did not become a law until day, by reason of the Governor failing to sign it, had evidently passed both houses several days previously, and was in the mind of the Legislature when the act of April 6, 1893, was passed.

The latter act was not intended, nor did it have the effect, to repeal, but simply to limit the operation of the former act to the first Monday in January, 1896, and the two acts could and did operate har-



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Louisville & Nashville R. R. Co. v. Adams' Admr.

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moniously until that date. The only question, therefore, in this case, is whether the simple amendment of section 272 of the original act made by substituting the word "chapter" for "article," which was done by the act of July 1, 1893, had the effect, or was intended to have the effect, of prolonging the operation of said section beyond the first Monday in January, 1896. It could not have such effect without a repeal, either expressly or by implication, of section 1 of the act of April 6, 1893. That section was not repealed by the act of July 1, 1893, expressly; nor, there being no repugnancy between the two acts, was it repealed by implication.

It therefore results that the act of April 6, 1893, being still in force, appellant, having entered upon his duties as Secretary of State subsequently to that date, is entitled to no more or greater compensation for his services than \$3,000.

Judgment is affirmed.

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CASE 108—ACTION FOR DAMAGES FOR INJURY CAUSING  
DEATH—JUNE 14.

Louisville & Nashville R. R. Co. v. Adams'  
Administrator.

106 859  
120 249

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APPEAL FROM LINCOLN CIRCUIT COURT.

1. NEGLIGENCE—DUTY OF ENGINEER TO ANTICIPATE DANGER OF BRAKEMAN.—When an engineer is backing his train for the purpose of having a coupling made, it is his duty to look out for danger in his rear and watch the movement of the brakemen and use reasonable care and diligence in ascertaining any danger to which the latter may be subjected, and if he fails to do so and the brakeman loses his life by reason of such failure, the company is liable.

## Louisville &amp; Nashville R. R. Co. v. Adams' Admr.

2. CONTRIBUTORY NEGLIGENCE—INSTRUCTION.—The court in such an action properly instructed the jury that although they might believe from the evidence that the engineer was grossly negligent in backing his train at an unusual rate of speed, yet they should find for the defendant if they believed from the evidence that the deceased was ordinarily negligent either (1) in undertaking to make a coupling, or (2) in standing with one foot between the rails and that such position was a want of ordinary prudence on his part, or (3) in attempting to make the coupling at a time when the cars were in motion, knowing the same to be more than ordinarily dangerous, or (4) that for the position of making the coupling the deceased entered between the cars from the left side of said train when such entry was a want of ordinary prudence.

## H. W. BRUCE FOR THE APPELLANT.

1. The instruction as to contributory negligence was fatally erroneous. The instruction tells the jury that "*If the engineer knew, or might by the exercise of reasonable diligence have known the position and conduct of Adams, they can not find for defendant on the ground of Adams' negligent position.*" The instruction is erroneous by reason of inserting the words in italics. *Johnson's Admr. v. L. & N. R. R. Co.*, 91 Ky., 653.
2. The verdict is flagrantly against the evidence.
3. The proof shows contributory neglect.
4. In view of the rules governing the action of brakemen in making couplings, it was error to admit testimony showing that it was safer to couple by hand.

## EDWARD W. HINES IN A SUPPLEMENTAL BRIEF FOR APPELLANT.

1. The petition fails to allege that the negligent servants were superior in authority to plaintiff's intestate; and unless there was such superiority, there can be no recovery. *Volz v. C. & O. Ry. Co.*, 95 Ky., 188.
2. There is no direct allegation imputing negligence to the servants of the defendant. The allegation that "the injury and death was caused by the gross negligence of the defendant, its agents and servants in charge of the train" is a mere inferential allegation of negligence.
3. The instruction defining the duty of defendant to the plaintiff is erroneous in that it does not require the jury in order to find for the plaintiff to believe that the speed at which the train was backing caused the injury. It was erroneous also in submitting the question of punitive damages. *McHenry Coal Co. v. Sneden*, 17 Ky. Law Rep., 1261. If any instruction authorizing punitive damages was proper, the instruction given was misleading.

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Louisville & Nashville R.R. Co. v. Adams' Admr.

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4. The measure of compensatory damages was also erroneous. *L. & N. R. R. Co. v. Eakins' Admr.*, 45 S. W. R., 529.
5. The second instruction was erroneous in directing the jury to find for plaintiff notwithstanding his contributory negligence if they believed that the engineer knew, or might by the exercise of reasonable diligence have known the position and conduct of Adams, as therein set forth, in time to have avoided running the cars against him by the use of such available means as were at hand at the time. There is no evidence tending to show that after Adams was placed in peril, any amount of care could have prevented injury.

## W. G. WELCH FOR THE APPELLEE.

1. The verdict is sustained by the evidence. This court will not invade the peculiar province of the jury unless the verdict be clearly and flagrantly against the evidence. *Varble v. Bigley*, 14 Bush, 698; *L. & N. R. R. Co. v. Mitchell*, 87 Ky., 327.
2. The plaintiff's denial of the defense of contributory neglect was a valid denial of all but the act itself. *Cincinnati, &c., R. Co. v. Barker*, 94 Ky., 77; *Ency. of Pld. & Pr.*, vol. 1, p. 798, note 3. The reply specifically denies that the plaintiff was guilty of any act of negligence contributing to the injury complained of. This made a complete and perfect issue on that subject. *C. & O. Ry. Co. v. Smith*, 39 S. W. R., 833; *L. & N. R. R. Co. v. Wolfe*, 80 Ky., 84. Were it otherwise, however, the defect is cured by the verdict. *Woodcock v. Farrell*, 1 Met., 443; *Stevens on Pl.*, pp. 147-8-9; *Drake's Admr. v. Semonin*, 82 Ky., 291.
3. It was incompetent to permit plaintiff to prove the danger of coupling by hand as compared with that by using a coupling-stick. *L. & N. R. R. Co. v. Foley*, 94 Ky., 229.
4. The court did not err in instructing the jury. The language of the instruction italicized by counsel for appellant and complained of is not objectionable. *Shearman & Redfield on Negligence* (4th ed.), vol. 1, secs. 99 and 100.

## CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

Whilst coupling cars in the service of the appellant, the appellee's intestate received injuries from which he died. This action, brought by his administrator to secure damages for his death, resulted in a verdict and judgment for \$5,000; hence this appeal.

The evidence is abundant that the moving cars which

were backed upon the standing, or dead one, for the purpose of effecting the coupling were moved back at an unusual speed and came upon the standing car "with a terrible crash," as put by one witness, and with the "loudest noise" ever heard in such work, as said by another, who had lived in the vicinity for nearly twenty years, and had seen such work night and day. Others, who lived from seventy-five to two hundred and seventy-five yards away, were "alarmed" at the noise of the collision.

The chief defense was the plea of contributory negligence on the part of the decedent. The issues on this behalf, as well as on the whole case, were very lucidly submitted to the jury by the learned trial judge. The real points of the defense are thus submitted: "If you believe from the evidence in the case that (1) the deceased undertook to make a coupling between the moving and the dead cars without using a coupling stick, and that such omission of this stick was a want of ordinary care or prudence for his own safety; or (2) that in attempting to make the coupling the deceased stood with one foot between the rails, and that such position was a want of ordinary prudence for his own safety; or (3) that in attempting to make the coupling the deceased did so at a point of time when the cars were in motion, and that he knew or had reasonable grounds to know that this was more than ordinarily dangerous; or (4) that for the purpose of making the coupling the deceased entered between the cars from the left side of the train, when the entry from the left side was a want of ordinary prudence for his own safety,—then, on either of such states of fact, the deceased was guilty of ordinary neglect of means and opportunities for his own safety. So, therefore, you are further instructed that, although you may believe from the evidence that defendant's en-

gineer was grossly negligent in the respects mentioned in the first instruction (that is, in moving the cars back at the unusual rate of speed), yet if you further believe from the evidence that the deceased was ordinarily negligent of his own safety in any or all of the respects set forth in this instruction, and that the injury to him would not have happened if he had not been, then you will find for the defendant, unless you further believe that the engineer knew, or might by the exercise of reasonable diligence have known, of the position and conduct of Adams, as herein set forth, in time, to have avoided running the cars against him by the use of such available means as were at hand at the time, in which latter state of case you can not find for the defendant on the grounds of Adams' negligent position or conduct."

It seems to us that these instructions covered fully the grounds of the defense, and stated the case very favorably for the company.

It is contended that the engineer was not bound to exercise reasonable diligence to know the dangerous position of the brakeman; but have actual knowledge of it, and fail to use reasonable effort to arrest the danger, before a recovery can be had on this branch of the case. But, while this is the rule generally as to trespassers and wrongdoers, it does not apply to a case when the engineer is backing his train for the purpose of having a coupling made. In that state of case, it is his duty to look out for the danger in his rear, and watch the movements of the brakeman, and use all reasonable care and diligence in ascertaining any danger in which the brakeman may be placed. *L. & N. Railroad Co. v. Earl's Adm'r*, 94 Ky., 375, [22 S. W., 607].

We perceive no error in the case, and the judgment is therefore affirmed.

CASE 109—INDICTMENT FOR CONSPIRACY—JUNE 15.

## Aetna Insurance Co., Etc. v. Commonwealth.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. CONSPIRACY—TO FIX INSURANCE RATES.—It is not an indictable offense to conspire to fix insurance rates, either by virtue of section 8915 of the Kentucky Statutes against conspiracies to regulate the prices of "merchandise, manufactured articles or property of any kind;" or by the common law as it existed prior to the fourth year of King James I.
2. PROCESS—SERVICE ON INSURANCE COMMISSIONER UPON INDICTMENT AGAINST INSURANCE COMPANY.—A summons upon indictment against an insurance company may properly be served upon the Insurance Commissioner by virtue of section 631 of the Kentucky Statutes.

PIRTLE &amp; TRABUE FOR THE APPELLANTS. (W. S. PRYOR, GEORGE L. PADDOCK AND J. I. LANDES OF COUNSEL.)

1. The service of summons upon the Insurance Commissioner, W. H. Stone, was not sufficient to bring the defendants before the court. Ky. Stats., sec. 631; Criminal Code, secs. 138, 146, 147.
2. The indictment is insufficient in law and the circuit court erred in overruling the demurrer thereto. *United States v. Walsh*, 5 Dill., 58; *Com. v. Shedd, &c.*, 7 Cush., 514; *March v. People*, 7 Barb., 391; *Lambert v. People*, 9 Cowen, 578; *United States v. Cruikshank, &c.*, 92 U. S., 542; *Steamship Co. v. McGregory, &c.*, Appeal Cases (1892), 25; *Hornby v. Close* L. R. 2 Q. B., 153; *Lord Campbell, C. J.*, in *Hilton v. Eckersley*, 6 El. & Bl., 47, 66; *Hannen J. in Farrer v. Close*, 4 Q. B., L. P., 602, 612; *Tarleton v. McQuawley, Peak*, N. P. V., 270; *Clifford v. Brandon*, 2 Camp, 358; *Gregory v. Brunswick*, 6 Man. & G., 205; *Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringill*, 11 East, 574; *Garrett v. Taylor*, Cro. Jac., 567; *Bowen v. Hall*, 6 Q. B. D., 333; *Lumly v. Gye*, 2 E. & B., 216; *Skinner v. Gunton*, 1 Wm. Saund., 229; *Hutchings v. Hutchings*, 7 Hill N. Y. Cases, 104; *Bigelow Leading Cases on Torts*, 207; *O'Connell v. The Queen*, 11 C. L. & F., 155; *Reg. v. Parnell*, 14 Cox Crim. Cases, 508; *Reg. v. Rowlands*, 17 Q. B., 671; *Macauley v. Tierney*, 19 R. I., 255; s. c. 61 Am. St. Rep., 770; *Mogul S. S. Co. v. McGregory*, L. R., 23 Q. B., 598; L. R. (1892) App. Cases, 25; *Bohn Mfg. Co. v. Hollis*, 54 Minn., 223;

## Aetna Insurance Co., &amp;c., v. Commonwealth.

s. c. 40 Am. St. Rep., 319; Sayre v. Louisville Union Benevolent Assn., 1 Duv., 143; Wharton's Crim. Law, vol. 1, p. 786; 3 Chitty's Crim. Law, 1139; Cote v. Murphy, 159 Penn. St., 420; s. c. 39 Am. St. Rep., 686; Com. v. Carlisle, Bridge, N. P., 39; Bohn Co. v. Hollin, 54 Minn., 223; s. c. 40 Am. St. Rep., 319; Queen Ins. Co. v. State, 86 Texas, —; s. c. 22 L. R. A., 483; People v. Chicago Gas Trust Co., 130 Ill., 268; s. c. 8 L. R. A., 497; India Bagging Assn. v. Kock, 8 La. An., 164; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal., 387; Morris Run Coal Co. v. Bardey Coal Co., 68 Pa., 173; s. c. 8 Am. Rep., 159., 4 Black. Com., ch. 12, sec. 9; Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. Rep., 310; People v. Sheldon, 139 N. Y., 251; Nash v. Page, 80 Ky., 539; Budd v. New York, 143 U. S., 517, 532; Paul v. Virginia, 8 Wallace, 183; Dueber Watch Co. v. Howard Co., 35 U. S. App., 16; Butchers' Union Co. v. Crescent City Co., 111 U. S., 746-62; Allegeyer v. Louisiana, 165 U. S., 578; Hopkins v. U. S., 171 U. S., 603; Sinking Fund Cases, 99 U. S., 700, 747; Printing Co. v. Sampson, L. R., 19 Eq., 465; Nathan v. Louisiana, 49 U. S., —; 8 Howard, 73; 12 L. ed., 993; State v. Phipps, 50 Kan., 609; s. c. 18 L. R. A., 657; Paul v. Virginia, 75 U. S., —; 8 Wall., 168; 19 L. ed., 357.

3. The court erred in admitting improper evidence and in excluding proper evidence.
4. The court erred in its instructions to the jury..
5. It was error to render judgment upon the verdict against the defendants.
6. The defendants have been tried, convicted and adjudged to be criminals and deprived of their property without due process of law in violation of the Constitution of the United States.

PADDOCK, WRIGHT & BILLINGS FOR APPELLANTS, GLENS FALLS INS. CO., DELAWARE INS. CO., AND RELIANCE INS. CO. (GEO. L. PADDOCK, JAMES S. PIRTLE, EDMUND F. TRABUE OF COUNSEL.)

1. The indictment was bad for generality and the demurrer should have been sustained because the supposed conspiracy was not described with certainty and particularity required by common law and the Code. Com. v. Ward, 92 Ky., 158, and cases there cited; Crim. Code, secs. 122, 123, 124.
2. Neither the case alleged nor that proved shows an indictable offense. There was no evidence of any unlawful combination. The appellants were held criminally liable for no other acts than such as were lawfully incident to liberties and rights of property guaranteed by the Constitution of the State and that of the United States. The forcible taking by the State from appellants

## Aetna Insurance Co., &amp;c., v. Commonwealth.

of the amount of money covered by the fines was a deprivation of their property without due process of law, and contrary to the law of the land; it was an exercise of arbitrary power over their liberty and property; it impaired their right of acquiring property and denied to them equality and the equal protection of the laws. Ky. Con., secs 1, 213, *et seq.*, 198; U. S. Con., Amendments, art XIV; Ky. Stats., sec. 3915, *et seq.*, *Frorer v. People*, 141 Ill., 171; *Millett v. People*, 117 Ill., 294; *Braceville Coal Co. v. People*, 147 Ill., 66; *Ramsey v. People*, 142 Ill., 380; *Ritchie v. People*, 155 Ill., 98; *Elden v. People*, 161 Ill., 296; *Cooley's Con. Lim.* (1st ed.), 391, 393; *State v. Goodwill*, 33 W. Va., 179; *State v. Coal Co.*, 33 W. Va., 188; *Queen Ins. Co. v. State of Texas*, 86 Tex., 250, and cases cited.

In support of argument of the foregoing points, counsel made the following additional citations: *Santa Clara County v. S. P. R. R.*, 118 U. S., 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 181; *Georgia R. R. v. Smith*, 128 U. S., 174; *Covington Tp. Co. v. Sandford*, 164 U. S., 578; *Gulf, Colorado, & Santa Fe R. R. Co. v. Ellis*, 165 U. S., 150; *Minnesota, &c., St. L. R. R. Co. v. Minnesota*, 134 U. S., 413; *Charlotte, &c., R. R. Co. v. Gibbs*, 142 U. S., 386; *S. L. & S. F. R. R. Co. v. Gill*, 156 U. S., 649; *Smyth v. Ames*, 169 U. S., 522.

S. E. SLOSS AND W. W. THUM FOR APPELLANT, CONTINENTAL INS. CO.

1. The indictment is bad upon two grounds:

(a) Because it is defective in form and wholly insufficient in stating the facts of the alleged offense so as to apprise defendants of the offense charged in order that the judgment therein would be a bar to any other prosecution for the same offense. This is true whether the offense attempted to be described be a criminal conspiracy by statute or at common law, or whether it be such by reason of the object being unlawful or whether by reason of the use of unlawful means in accomplishing the object. *Crim. Code*, secs. 122, 123, 124; *Com. v. Ward*, 92 Ky., 158; *U. S. v. Walsh*, 5 Dillon, 58; *March v. People*, 7 Barb., 291; *Lambert v. People*, 9 Cowan, 578; *State v. Parker*, 43 N. H., 83; *State v. Keach*, 48 Vt., 118; *State v. Roberts*, 34 Me., 320; *State v. Mayberry*, 48 Me., 218; *State v. Ripey*, 31 Me., 386; *Com. v. Wallace*, 16 Gray, 221; *Com. v. Prius*, 9 Gray (Mass.), 127; *Wright on Crim. Consp.*, pp. 205, 211, 257.

(b) The combination of insurance companies for inspection in common and to fix rates of insurance is no criminal offense in Kentucky by common law or by statute, and the indictment does not describe any offense known to the law. Kentucky courts announce that only such rules of the common law of England and



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Aetna Insurance Co., &c., v. Commonwealth.

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acts of Parliament as are of a general and not local nature to that kingdom, and were in force prior to 1607, are adopted by this State and that no rule of the common law not then recognized and in force in England should be recognized and enforced there. *Lathrop v. Commercial Bank, of Scioto*, 8 Dana, 121; *Ray v. Sweeney*, 14 Bush, 2. No case for conspiracy other than under statute can be found in England prior to 1607, though it is remarked that a conspiracy to falsely indict a man for murder would be a conspiracy at common law. The then existing statutes against combinations to raise wages and to raise prices of food stuffs, &c., on the way to market have never been extended beyond their terms, and do not embrace the subject matter here. There are no conspiracies punishable at common law except those involving fraud, malice, political conspiracies, conspiracies to commit crimes, to maintain false suits and prosecutions, &c. Combinations in the business world in restraint of trade, etc., while in many cases void as against public policy so that contracts made in pursuance thereof are not enforceable, are not unlawful in the sense of being criminal. This is the substance of the English and American cases, and is supported by the overwhelming weight of authority. Wright on Criminal Conspiracies, ch. 1, and notes; History of Criminal Law of England, Sir J. S. Stephen, ch. x x x. *Mogul Steamship Co. v. McGregor*, 21 Q. B. D., 455; s. c. 23 Q. B. D., 616; S. C. L. R. App. Cases, 25. The foregoing authorities review all the common law authorities and hold that no adjudged case in England holds combinations in restraint of trade criminal at common law. Such never was the law in England before 1607 or since. The American cases are to the same effect. *Queen Ins. Co. v. State of Texas*, 86 Tex., 250; s. c. 24 S. W. R., 397; *Anheuser-Busch v. Hauck*, 57 S. W. R., 692; *Continental Ins. Co. v. Board of F. Underwriters*, 67 Fed. Rep., 313; *State v. Lambert Rickey*, 4 Halst. (N. J.), 293; *Huston v. Reutlinger*, 91 Ky., 333; *Schulten v. Bavarian Brew. Co.*, 96 Ky., 224; *Sayre v. Louisville Union, &c.*, 1 Duv., 143; *Brewster v. Miller's Sons*, 19 Ky. Law Rep., 593; *Ky. Wagon Mfg. Co. v. O. & M. Ry.*, 17 Ky. Law Rep., 726; *Hetterman v. Powers*, 19 Ky. Law Rep., 1087; *Longshore Printing Co. v. Howard*, 26 Ore., 527; *Union Pac. Ry. Co. v. Cook*, 50 Am. & Eng. R. R. Cases, 89 and note; *Ky. Wagon Mfg. Co. v. L. & N. R. R. Co.*, 98 Ky., 152; *American Fire Ins. Co. v. State of Miss.*, 22 Sou. Rep., 103; *U. S. v. Addyston P. & S. Co.*, 85 Fed. Rep., 271; The following cases based on statutes are not contra: *Beechley v. Mullville*, 102 Iowa, 602; *State v. Phipps* (50 Kan.), 18 L. R. A., 657.

2. The Kentucky statute being broader than the common law stat-

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Aetna Insurance Co., &c., v. Commonwealth.

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utes, and embracing the subject-matter of those statutes, and many other matters besides, and being general in its character, supersedes and substitutes all previous laws existing on the subject of pools, trusts and combinations. Ky. Stats., sec. 3915; Ky. Con., sec. 198; Endlich on Int. of Stats., sec. 203; Com. v. Cooley, 10 Pick., 36, 39; Com. v. Marshall, 11 Pick., 350; State v. Boager, 7 Mo., 631; Towle v. Marret, 3 Greenl. (Me.), 22; Broadus v. Broadus, 1 Bush, 299; Patterson v. Com., 86 Ky., 313, 318; Smith v. Mattingly, 96 Ky., 228; Buchannon v. Com., 95 Ky., 334; Long, Treas., v. Stone, Auditor, 19 Ky. Law Rep., 246. Also the policy of the State having been fixed by the State (sec. 198 of Constitution), a common law rule, if any ever such existed, will not be pushed beyond that policy.

3. Criminal statutes must be confined to the matters embraced in them, and no one can be deprived of his life, liberty or property by virtue of criminal laws, unless the same be definite, and expressly and clearly embrace the supposed offense charged. L. & N. R. R. Co. v. Com., 18 Ky. Law Rep., 42; Endlich on Int. of Stats., 329 to 339; State v. Powers, 36 Conn., 77; Com. v. Cook, 50 Pa. St., 201; West. Union Tel. Co. v. Ackstell, 69 Ind., 199; Lair v. Killman, 25 N. J. L., 522; Philadelphia v. Wright, 4 Phil. (Pa.), 138; U. S. v. Wiltberger, 5 Wheat., 76, 105; Proctor v. Mainwaring, 3 B. & A., 145.
4. The evidence signally fails to bear out the indictment either as to criminal intent, stifled competition or extortionate rates. It was within the power of the Commonwealth if the charges had been true to prove them.
5. The non-board companies not being bound by any agreement to adhere to the scale of rates established by the boards can in no event be held liable to the fines.
6. The subject-matter of insurance can not be likened to the tangible commodities and pre-existing articles within the purview of the statutes of Edward VI., or of the statutes of Virginia, or of the present statutes of Kentucky. It is different by reason of the fact that it relates to the inherent and intangible right to exercise the power and capacity to write indemnity contracts. Moreover unrestrained competition in the sense of producing rate wars between insurance companies is an injury to the public instead of a benefit. Policy holders are interested in having uniform and adequate rates of insurance. Under the modern system of insurance as exercised in the United States, certain reserves are set apart, being proportionate parts of premiums collected, which, according to the results of experience, are deemed sufficient to meet the liability on the risks written, from which those premiums were collected. If an inadequate and in-

sufficient rate be collected by the company, no matter whether forced or brought about by competition or otherwise, this reserve set apart under the statutes would be insufficient to meet the liabilities, and although companies may comply with the letter of the statutes by reserving the statutory proportion of premiums collected, the property owners are thus deprived of the security for which they pay. The capital of insurance companies is a mere margin or guarantee, not to be diminished or impaired under all the State laws. Therefore it is to the reserve that property owners must look to meet the liabilities which may fall upon them and upon the insurance companies, by reason of the risk of fire; in other words, all insurance is of necessity, to a great extent, co-operative.

Moreover, the equitable rating of insurance is a matter which is of the greatest interest to property owners. It should be taken up scientifically, and arrived at by the results of experience, and not by reckless cutting of rates. Experience had demonstrated that there is, after all, a certainty of results in the statistics relating to fire hazards, and that buildings of certain construction and certain kinds under certain conditions are subject to definite percentages of risk, for which, in any proper system of rating, allowances must be made, and the rate fixed accordingly. Constant inspection to keep up with improvements in buildings and constant adjustments for precautions taken or neglected, are absolutely necessary, and united action on the part of companies, is equally as necessary, not only to save expenses of inspection, which in the end must be borne by the policy holder, but also to arrive at the true rate for any particular piece of property, real or personal, which true rate can not vary, if it be scientifically accurate, but which must be uniform. Thus co-operation both as to inspection and as to rate, which is the necessary result of proper inspection, so far from being injurious, is in the highest degree beneficial to the insuring public.

7. The court erred in the admission and rejection of evidence and giving and refusing instructions.

W. S. PRYOR ALSO FOR THE APPELLANTS.

1. There is no offense charged in the indictment.
2. If an offense had been charged, there is no evidence to support it.  
Citations: Com. v. Eastman, 1 Cush., 223; U. S. v. Hess, 124 U. S., 486; Lambert v. People, 9 Cowan, 578; 4 Met. (Mass.), 125.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR APPELLEE.

1. All conspiracies to do a thing, the end or means of which are unlawful, and all conspiracies to do a wrong affecting the gen-

Aetna Insurance Co., &c., v. Commonwealth.

eral public or an individual thereof, are indictable. 4 Am. & Eng. Ency. of Law, 584; 2 Bishop's Crim. Law, sec. 172.

ROBT. B. FRANKLIN, COMMONWEALTH'S ATTORNEY, ALSO FOR APPELLEE (W. S. TAYLOR, ATTORNEY-GENERAL, OF COUNSEL.)

1. It is an indictable offense at common law to conspire to do any act, the manifest tendency of which is to affect injuriously the public or any class or body of men. And where a purpose to be accomplished is a manifest injury to the public, the means for its accomplishment need not be specifically stated in the indictment. *Ins. Co. v. State*, 75 Miss., 24; *Anderson v. Jett*, 89 Ky., 375; *Huston v. Rentlinger*, 91 Ky., 333 and cases cited; *Stanton v. Allen*, 5 Denio, 434; *Craft v. McConoughy*, 79 Ill., 346; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Penn. St., 173 and cases cited; *Hilton v. Eckersley*, 6 Ellis & Black., 47, and cases cited; *Arnot v. Pittston*, 68 N. Y., 558; *People v. Sheldon*, 139 N. Y., 251; *Judd v. Harrington*, 139 N. Y., 105; *People of New York v. Milk Exchange, Lmted.*, 145 N. Y., 267; *Leonard, Recr., v. Pool*, &c., 114 N. Y., 371; *Stewart v. Erie & W. Transp. Co.*, 17 Mich., 395; *Wright v. Ryder*, 36 Cal., 342; *People of Illinois v. Chicago Gas Trust Co.*, 8 L. R. A., 497 and cases cited; *Moore v. Bennett*, — Ill., —; s. c. 15 L. R. A., 361, and authorities cited; *King v. De Berenger*, 3 Maule & Selwyn, 67; *Chitty Crim. Law*, vol. 3, p. 1139, and cases cited; *Am. & Eng. Ency. of Law; Criminal Conspiracy* by Robt. Desty; *King v. Journeymen Tailors of Cambridge*, 8 Mod. Reps., 10 and cases cited; *Queen v. Kenrick*, 5 A. & E., 49 and cases cited; *King v. Eccles*, 3 Doug., 337; *Regina v. Parnell*, 14 Cox Crim. Cas., 508; *Levi v. Levi*, 6 Carr. & Payne, 239; *Note to Casey v. Cincinnati Typographical Union*, No. 3 (45 Fed. Rep., 135), 12 L. R. A., 193; *State v. Buchanan*, 5 Harris & Johnson, 317; s. c. 9 Am. Dec., 534; *State v. Donaldson*, 3 Vroom, 151; s. c. 90 Am. Dec., 649; *Crump v. Com.*, 84 Va., 927; s. c. 10 Am. St. Rep., 895; *People v. Richards*, 1 Mich., 216; s. c. 51 Am. Dec., 75 and note; *Mifflin v. Com.*, 5 Watts & Sergeant, 461; s. c. 40 Am. Dec., 527; *State v. Murphy*, 6 Ala., 765; s. c. 41 Am. Dec., 79 and cases cited; *Com. v. Ward*, 92 Ky., 158; *Com. v. Ward*, 1 Mass., 473; *Com. v. Judd*, 3 Id., 329; *State v. Burnam*, 15 N. H., 396; *People v. North River Sugar Refining Co.*, 5 L. R. A., 33; *State v. Norton*, 23 N. J. L., 40; *State v. Phipps*, 18 L. R. A., 657; *Beachley v. Mulville, et al.*, 102 Ia., 602; *U. S. v. Trans-Missouri Freight Assn.*, 166 U. S., 290 (41 Lawyers' ed., 1007); *Roberson's Ky. Crim. Law and Proceed.*, sec. 94.
2. The indictment complained of in this case allèged specifically a

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Aetna Insurance Co., &c., v. Commonwealth.

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combination to stifle and kill the effect of free competition in insurance rates, and thereby to enable the defendants to extort from the insuring public large sums of money which they would not obtain if such competition were not stifled. Under the authorities cited under point one, this indictment was sufficiently specific.

JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of conviction under an indictment charging appellants with "the offense of unlawfully conspiring, by persuasion, intimidation, and force, to counteract, avoid, stifle, and kill the effect of free competition among fire insurance companies and agents engaged in and offering to do a fire insurance business in the city of Frankfort, county of Franklin, and State of Kentucky, committed as follows, viz.: The said Aetna Insurance Company, a corporation organized under the laws of the State of Connecticut [and eighty-six others], in the said city of Frankfort, county of Franklin, and State aforesaid, on the 22d day of September, 1898, and within one year before the finding of this indictment, did then and there, each with the other, and with other persons, associations, firms, and corporations to this grand jury unknown, unlawfully conspire, confederate, combine, enter into, maintain, consummate, and continue an unlawful pool, trust, conspiracy, confederation, combination, compact, and agreement, intending and contriving thereby to persuade, intimidate, compel, and force all agents and companies then and there engaged in and offering to do a fire insurance business to enter into, maintain, consummate, and continue said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement, the objects, aim, and ends of which were then and there to counteract, avoid, stifle, and kill the effect of free competition among all insurance companies and agents then and

there engaged in and offering to do a fire insurance business, to fix and maintain the cost of fire insurance to the insuring public at a greater premium rate than would otherwise have to be paid, and thus unlawfully to exact, extort, and procure great sums of money from citizens of this Commonwealth, owning and insuring property in the city of Frankfort, county of Franklin, and State aforesaid, which said great sums of money said citizens would not have to pay but for the existence of said unlawful pool, trust, conspiracy, combination, confederation, compact and agreement, and which said unlawful pool, trust, conspiracy, combination, confederation, compact, and agreement so as aforesaid entered into, consummated, maintained, and continued by the parties aforesaid is of grievous prejudice and hurt to the common and public good and welfare, of evil example, and against the peace and dignity of the Commonwealth of Kentucky."

To sustain this charge of conspiracy, the Commonwealth introduced the Constitution and by-laws of the Kentucky and Tennessee Board of Fire Underwriters and the Frankfort Board of Underwriters, to show the objects of the associations named, together with evidence that appellants were engaged in fire insurance business at Frankfort through agents who were members of the Frankfort or local board. Not all of the appellants were members of the Kentucky and Tennessee board, but all appear to have done business in Frankfort through members of the board.

The Kentucky and Tennessee board was an association of fire insurance companies doing business in the two States named; the object stated in its constitution being "to organize and maintain local boards, to establish and enforce uniform commissions, adequate

rates, correct forms of policies, and to inculcate sound principles of underwriting." Each company desiring membership was required to subscribe to the constitution and by-laws through its representatives, "thereby pledging itself to the objects and regulations of the association, and every member of this association shall require its agents to unite with local boards, and to co-operate actively therewith; but *all rules and rates* of the association *must be enforced by members*, whether adopted by the local boards or not." The by-laws require the secretary, "under the direction of the executive committee, to promulgate rates and rules of the association."

The Frankfort board, entitled "The Local Board of Fire Insurance Agents of Frankfort, Kentucky," had for one of its objects, as declared by its constitution, the establishment "and maintenance of adequate and equitable rates." Membership was confined to agents of companies and officers of local companies, and no person was eligible to be a member who was in any way interested in insurance business with a person or company not a member, "unless they also are governed by all the rules and rates adopted by the board." Every member was required "strictly and rigidly to adhere to the rules and rates adopted by the board, without deviation in letter or spirit." By the by-laws, provision was made for an executive and rating committee to survey and report risks. The surveys and rate books issued to members were the property of the board, and returnable upon its order. Misrepresentation or improper means of interference by agents subjected the party offending to charges. No agent was allowed to employ a solicitor or broker. Members were forbidden to attempt to create or foster prejudice against the State association, the local

board, or its members. There were provisions against dividing commissions, and writing risks outside the jurisdiction of the board at less than the established rate at the locality of the risk. Obedience to these regulations was to be enforced according to a schedule of penalties fixed in the by-laws, and members were to be punished for violation of rules or rates by suspension from membership, after hearing, upon a two-thirds vote, followed by a request to the companies of such agent that his commission be cancelled.

Testimony was introduced tending to show that a considerable increase had taken place in the rate of insurance in Frankfort and vicinity after the establishment of these boards. It is not necessary here to go further into the testimony.

A number of questions are presented upon this appeal, and have been most elaborately argued by counsel.

Among other grounds for reversal presented, it is urged that under the ruling in *Com. v. Ward*, 92 Ky., 158. [17 S. W., 283], the indictment did not sufficiently set forth the facts stating the offense attempted to be charged; that the evidence was insufficient to sustain the charge; that this was especially true as to the so-called non-board companies, which were not members of either board, and against whom the only testimony connecting them with the alleged conspiracy is the fact that they employed agents in Frankfort who were members of the local board, thereby adopting the rates promulgated by that board; that the service of summons upon the Insurance Commissioner was not sufficient to bring the defendants before the court to answer an indictment; and that the instructions did not present the law to the jury.

But the underlying question, which, if answered



in the negative, renders the consideration of these questions unnecessary for the disposition of this case, is whether, either by the common law or under the statute, there is in this Commonwealth such an offense as that attempted to be described in the indictment. This question we shall consider first.

It was conceded by counsel representing the Commonwealth, both in oral argument and brief, that this proceeding was not instituted under the statute, but under the common law; and a careful examination of the statute has convinced us that it does not apply to a case like the one at bar. It provides (Kentucky Statutes, section 3915):

"That if any corporation under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, company, firm, or individual, or other association of persons, shall create, establish, organize, or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any *merchandise, manufactured articles or property of any kind*, or shall enter into, become a member of, or party to, or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity of any article of property commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act."

The language used would indicate that the statute was intended to prevent pools and trusts forming for the purpose of fixing the price of merchandise and manufactured articles. Without giving undue weight to the argument that the punctuation shows the word "property" to be qualified by the adjective "manufactured," it seems certain that the *ejusdem generis* rule of construction does apply, and that property referred to in the section was property of the same general class or nature as that described previously by the words "merchandise and manufactured articles." And while it may be admitted that a contract, either for labor, or for indemnity against contingent loss, like an insurance contract, when executed, becomes property, because it is then a chose in action, the right to enter into such contracts, which belongs to all persons capable of contracting,—as well natural persons as artificial ones authorized by their organic law to make such contracts,—would hardly be considered to be included by the word "property," unless that word were used in a much broader sense than it is customarily used by lawyers or in statutes. We conclude, therefore, that the word "property," as used in the statute, does not include the right to enter into a contract of insurance, nor to fix the terms upon which such a contract will be made.

This brings us to consider whether, by the common law, as adopted into the jurisprudence of Kentucky, the acts whereof appellants have been charged constitute an indictable offense. And we should inquire further whether the English common law, at the time of its importation into our system, contained a principle which, by natural growth and expansion to meet the needs of social progress in a civilized State, has so enlarged its original scope as to include those acts in the catalogue of public offenses.

On behalf of the Commonwealth it is contended with great ability and fervor that criminal conspiracies—that is, conspiracies that were indictable at common law—included three classes: First, conspiracies to do an unlawful or indictable thing; second, conspiracies to accomplish a lawful purpose by means which were themselves unlawful or indictable; and, third, conspiracies to do a wrong affecting the general public, or an individual thereof, though neither the acts done to accomplish the end, nor the end itself, would be in themselves indictable, but for the conspiracy. Perhaps as clear and compact a statement of the Commonwealth's contention as can be given is to be found in an extract from the article by Mr. Robert Desty on Criminal Conspiracies, in the American and English Encyclopedia of Law:

"A criminal conspiracy is (1) a corrupt combination (2) of two or more persons, (3) by concerted action to commit (4) a criminal or an unlawful act; (a) or an act not in itself criminal or unlawful, by criminal or unlawful means; (b) or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; (5) or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppress either the public or an individual. . . . It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end, that constitutes a criminal conspiracy. The unlawful thing must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination.

It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough that they are wrongful; that is, amount to a civil wrong. . . .

"Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose, which has a tendency to prejudice the public in general, is an indictable offense, regardless of the means whereby it is to be accomplished."

2 Bishop on Criminal Law, section 172, is to substantially the same effect: "Conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or as an end. The unlawful thing must be such as would be indictable performed by one alone, or, not being such, be of a nature particularly adapted to injure the public or some individual by reason of the combination."

Relying upon these text writers, and upon the expressions of courts in a number of adjudged cases, the Commonwealth urges that fire insurance, in the progress of civilization, has grown to be an every day necessity; that a combination to prevent free competition among those engaged in the business is against public policy; that, at common law, all combinations to raise the cost of necessities were indictable, and therefore this combination is indictable here.

Considerable argument on the other side is devoted to the attempt to show that the combination here complained of is not only not obnoxious as against public policy, but a positive benefit to the public, since by the maintenance of adequate rates it secures

the companies bound by it against doing business in a manner which might render them insolvent, and thereby cause loss to the policyholders. This argument, which is plausible, if not convincing, need not be here considered.

In this State the law seems to be well-settled that agreements in restraint of trade or commerce are so far against public policy as to be illegal, in the sense of being void and not enforceable. *Anderson v. Jett*, 89 Ky., 375, [12 S. W., 670].

In *Huston v. Reutlinger*, 91 Ky., 333, [15 S. W., 867], it was held that an association of underwriters almost exactly similar to the ones now in question, organized "for the purpose of securing uniformity in the rates of premiums, harmony in the conditions of insurance," etc., was void, in so far as it undertook to regulate the employment of solicitors, the time of employment, and the compensation to be paid. And while there are decisions on the subject holding that the business of insurance, as carried on in one State by a company incorporated in another, was not commerce between the States (*Paul v. Virginia*, 75 U. S., 8 Wall., 168; *State v. Phipps*, 50 Kan., 609, [34 Am. St. R., 152, 18 L. R. A., 657, 31 Pac., 1097]), and in which it has been held that a dealer in foreign exchange was not engaged in commerce, but merely in supplying an instrument of commerce (*Nathan v. Louisiana*, 49 U. S., 8 How., 73), this court seems to have had no difficulty in holding that a combination in restraint of the exercise of the right to contract for labor was against public policy, and an agreement to be bound by the rules of such combination was void.

We shall assume, therefore, that under the cases of *Anderson v. Jett* and *Huston v. Reutlinger*, *supra*, and *Sayre*

v. Louisville Union Benevolent Association, 1 Duv., 143, [85 Am. Dec., 613], the agreement whereby appellants and their agents became members of the association mentioned was against public policy and void, in so far as it restrained or prevented free competition in the fire insurance business, and shall proceed to consider whether such a combination was an indictable offense by the common law as we obtained it, or included within the spirit of the common-law doctrine as to criminal conspiracies.

In *Lathrop v. Commercial Bank*, 8 Dana, 121, in an opinion by Chief Justice Robertson, this court, construing the question of how far the common law of England was adopted by Kentucky, said that only such principles of the common law as had been adjudicated before the fourth year of James I. had been adopted in Kentucky. The history of the adoption is given as follows:

"By an ordinance of 1776, Virginia adopted 'the common law of England, and all statutes or acts of Parliament made in aid of the common law prior to the fourth year of James I., and which [were] of a general nature and not local to that kingdom.'

"And the eighth section of the sixth article of the Constitution of Kentucky adopted, with certain qualifications, all laws which on the 1st of June, 1792, were in force in the State of Virginia.

"Unless the British mortmain acts were in force in Virginia on the 1st of June, 1792, they have never been in operation in Kentucky. Virginia had never, prior to June, 1792, specially enacted any mortmain statute; and, therefore, if the mortmain acts of England prior to the 4th of January were all 'local to that kingdom,' no part of them was ever in force in either Virginia or Kentucky."

In *Ray v. Sweeney*, 14 Bush, 2, [29 Am. R., 388], in an opinion by Judge Cofer, the court said:

"By an act of the Virginia convention of 1776, it was 'declared that the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of King James I., and which are of general nature, and not-local to that kingdom . . . shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of this colony.'" (*Morehead & Brown, Kentucky Statutes*, 612.)

The present Constitution provides, and previous Constitutions, in substance, provided, that "all laws which on the first day of June, 1792, were in force in the State of Virginia, and which are of a general nature, and not local to that State, and not repugnant to this Constitution, nor to the laws which have been enacted by the General Assembly of the Commonwealth, shall be in force in this State until they shall be altered or repealed by the General Assembly."

"But only such principles and rules as constituted a part of the common law prior to the fourth year of the reign of James I. are, or ever were, in force in this State. This is clearly implied in the act of 1776. To declare that the common law and statutes enacted prior to that time should be in force was equivalent to declaring that no rule of the common law not then recognized and in force in England should be recognized and enforced here.

"James I. ascended the throne of England in 1603 (March 24th), and the fourth year of his reign commenced March 24, 1607; and when it is sought to enforce in this State any rule of English common law, as such,

independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England prior to the latter date."

What, therefore, was the common law as to criminal conspiracies in the year 1607?

In Mr. Wright's admirable little book upon the Law of Criminal Conspiracies (section 1), it is said:

"There appears to be no evidence that during the first of these periods [A. D. 1200 to 1600] any other crime, or conspiracy or combination was known to the common law than that which was authoritatively and 'finally' defined in A. D. 1305 by the ordinance of conspirators (33 Edw. I.), as consisting in confederacy or alliance for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds. During the reigns from that of Edward III. to the end of that of Elizabeth, various statutes were directed against combinations for treasonable purposes or for breaches of the peace, against combinations by merchants to disturb the markets or prices, and against combinations by masons and carpenters, by victualers to raise prices, and by laborers to raise wages or alter hours; but no mention has been found in any of the writers, reports, or abridgements of the period before the seventeenth century of any kind of conspiracy, confederation, or combination, as being criminal at common law, except the crime of conspiracy as defined by the ordinance of 1305. The process by which this specific offense has been expanded into the comprehensive title of conspiracy or combination in the modern criminal law is now to be traced."

The author then proceeds to trace the expansion of the criminal law of England in this behalf until it "grew into a rule that a combination to commit or procure the com-



mission of any crime was criminal, and might be prosecuted as a conspiracy, although the crime might have nothing to do with the crime of conspiracy, properly so-called." He ascribes the principal share in the earlier stages of this development to the Court of Star Chamber.

Speaking of this book, Sir James Fitzjames Stephens, eminent alike as judge and law writer, says in the thirtieth chapter of his magnificent History of the Criminal Law of England:

"Mr. R. S. Wright, in a work of remarkable learning and ability, collected and commented, with a special view to this particular subject, upon every case ever decided upon the subject of conspiracy. The matter has also been fully discussed in many other works. The result is that the following statement as to the result of the authorities upon the subject may be depended upon:

"(1) No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is, indeed, one case (that of the journeymen tailors of Cambridge) which may perhaps be an authority the other way, but this appears doubtful.

"(2) There are some dicta to the effect that such combinations would be unlawful. The most important of these is the *dictum* of Grose, J., in *Rex v. Mawbey* [6 Term R., 636]: 'In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal,—as, in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he

can, but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy.' This *dictum* is an illustration not necessary to the decision of *Rex v. Mawbey*, and founded, as it seems to me, upon the case of the Cambridge tailors.

"(3) 'Some traces may be found in the ancient books of a doctrine that it may be criminal, independently of combination, for one man to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment.' These traces, however, are very faint, though it is clear enough that the attempt to create monopolies by royal grants, or by the by-laws made by bodies corporate or the like, or to restrain people by contract from exercising their trade, were always held to be illegal, except under certain limitations which do not affect this matter, in such a sense as to be void."

The result of the examination of the English cases is thus summarized in Stephen's remarkable book:

"Such, for the present, is the final result of the long history which I have been relating. It is one of the most characteristic and interesting passages in the whole history of the criminal law.

"First, there is no law at all, either written or unwritten. Then a long series of statutes aim at regulating the wages of labour, and end in general provisions preventing and punishing, as far as possible, all combinations to raise wages. During the latter part of this period an opinion grows up that to combine for the purpose of raising wages is an indictable conspiracy at common law. In 1825 the statute law is put upon an entirely new basis, and all the old statutes are repealed, but in such a way as to countenance the doctrine about conspiracies in restraint of

trade at common law. From 1825 to 1871 a series of cases are decided which give form to the doctrine of conspiracy in restraint of trade at common law, and carry it so far as to say that any agreement between two people to compel any one to do anything he does not like is an indictable conspiracy, independently of statute."

In the volumes of Wright and Stephen, all the English cases cited on behalf of the Commonwealth are considered and discussed, and it is very conclusively shown that prior to 1607 there was no such thing at the common law as criminal conspiracy, except the confederacy for the false and malicious promotion of indictments and pleas, or for embracery or maintenance of various kinds, and that whatever may have been the *dicta* of the judges who decided subsequent cases, or the deductions drawn therefrom by some of the text writers, the cases themselves, for more than 200 years thereafter, do not support the contention made on behalf of the Commonwealth.

There were a large number of statutes against forestalling, engrossing, regrating, and badgering, and a very large number against combinations of laborers and artisans to raise their wages. Some of the latter class were not formally repealed until the year 1875. Of this system of statutes Stephen says:

"I should not myself describe it as a system specially adapted and designed to protect freedom of trade. The only freedom for which it seems to me to have been specially solicitous is the freedom of the employers from coercion by their men."

The English cases cited on behalf of the Commonwealth are all discussed in the works referred to, and shown not to sustain appellee's contention.

In the case of *Mogul Steamship Co. (Steamship Co. v. McGregor, 21 Q. B. Div., 549)* there was a

confederation of steamship companies, united to drive their rivals out of the carrying trade between England and China. The question for decision was whether the federation constituted a conspiracy at common law, as being in general restraint of trade, and of particular injury to certain individuals and to the general public. The opinion in the Queen's Bench division was delivered by Lord Coleridge. Subsequently, in the appeal division of the Queen's Bench, reported in 23 Q. B. Div., 616, the opinion was delivered by Bowen, Lord Justice. It was subsequently decided in the House of Lords. The opinions of the judges on the first hearings, and those of the various law lords upon the final appeal, present a very complete review of all the English cases. Not to occupy too much time in their consideration, it may be remarked that the language of Crompton, J., in *Hilton v. Eckersley*, 6 Ellis and Blackburn, 47, relied on for appellee, was disapproved, Lord Halsbury saying in his opinion:

"I am unable to assent to that *dictum*. It is opposed to the whole current of authority. It was dissented from by Lord Campbell and Chief Justice Erle, and found no support when the case in which it was said came to the Exchequer Chamber, and it seems to me contrary to principle."

In the opinion of Lord Bramwell in the House of Lords, the doctrine was thus stated:

"I think, upon the authority of *Hilton v. Eckersley* and other cases, we should hold that the agreement was illegal; that is, not enforceable by law. I will assume, then, that it was, though I am not quite sure. But that is not enough for the plaintiffs. To maintain their action on this ground, they must make out that it was an

offense, a crime, a misdemeanor. I am clearly of the opinion it was not. Save the opinion of Crompton, J., (entitled to the greatest respect but not assented to by Lord Campbell or the exchequer chamber), *there is no authority for it in the English law.*" We think it unnecessary to go further in an examination of the English cases upon this subject. The opinions in the Mogul Steamship Case in themselves form a treatise upon the subject, and a very complete discussion of practically all of the English cases upon it.

It is evident from this examination that at the time the English common law, and the English statutes of a general nature, became a part of our system, the acts charged as an offense in this case were not indictable.

Nor do we think that any such principle has been adopted generally by the States of this Union as would justify us in holding, in the absence of all precedent to that effect in this State, that the acts charged are criminal. ♦♦

We do not consider it necessary to go into an extended review of the American cases upon this subject, but we shall refer to a few of them.

In *Hutchins v. Hutchins*, 7 Hill, 107, Chief Justice Nelson, in an elaborate opinion, in which the English cases are reviewed at length, said:

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another (that is, to diminish his gains and profits), and yet, so far from being criminal, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least,

innocent; if by falsehood or force, it may be stamped with the character of conspiracy."

To the same effect, see *Carew v. Rutherford*, 106 Mass., 14.

In a carefully considered opinion in the case of *United States v. Addyston Pipe & Steel Co.*, 29 C. C. A., 141, [85 Fed., 278],—a case arising under the Federal Statute,—Judge Taft, in discussing the statute, said:

"Contracts that were in unreasonable restraint of trade at common law were not unlawful, in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts. *Mogul Steamship Co. v. McGregor* [1892] App. Cas., 25; *Hornby v. Close*, L. R., 2 Q. B., 153; Lord Campbell, C. J., in *Hilton v. Eckersley*, 6 El. & Bl., 47, 66; *Hannon, J.*, in *Farrer v. Close*, L. R., 4 Q. B., 602, 612. The effect of the act of 1890 is to render such contracts unlawful, in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and public against the execution of such contracts and the maintenance of such trade restraints."

And see *Orr v. Home Mutual Insurance Co.*, 12 La. Ann., 255, [68 Am. Dec., 770]; *Macauley v. Tierney*, 19 R. I., 255, [61 Am. St. R., 770, 33 Atl., 1]; *Longshore Printing Co. v. Howell*, 26 Or., 527, [28 L. R. A., 424, 38 Pac., 547].

In the view we have reached as to this case, it is immaterial to discuss the cases which have arisen under more or less stringent statutes in a number of the States, of which *Queen Ins. Co. v. Texas*, 86 Tex., 250, [22 L. R.

A., 490, 24 S. W., 397], upon the one side, and *State v. Phipps*, 50 Kan., 609, [34 Am. St. R., 152, 18 L. R. A., 657, 31 Pac., 1097], upon the other, are fair examples.

There are some cases, it is true, where it seems to have been held that a combination to injure another in his business or reputation constituted an offense or afforded a cause of action. In these the element of malice seems to have been relied on. *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed., 738; *Casey v. Typographical Union* 45 Fed., 135.

We must not be mistaken as intimating that contracts in restraint of trade, or which prevent a contracting party from accepting employment from or giving it to whomsoever he may desire, are not illegal, in the sense of being void as against public policy. That such contracts are unenforceable is settled law in this State, and in most of the States of the Union. Indeed, the bulk of quotations from adjudged cases given in the very ingenious brief of counsel who represented the Commonwealth upon the trial are from cases where this was the question for decision. This is notably the case in his quotations from *Anderson v. Jett* and *Huston v. Reutlinger*, decided by this court. It is true that in *Com. v. Ward*, 92 Ky., 158, [17 S. W., 283], the court—misled, doubtless, by similar loose expressions in the text writers—used this language:

“A criminal conspiracy is a corrupt combination of two or more persons by concerted action to do an unlawful act, or an act not unlawful by unlawful means, or an act which would tend to prejudice the general public.”

But the latter clause of the sentence quoted was not at all necessary to the decision of the case then before the court, and must be considered as *dictum*.

We are not able, from a consideration of the cases decided in this State, to reach the conclusion that the doctrine as to criminal conspiracies to be deduced from the common law and statutes recognized in England prior to 4 James I. has exhibited any such growth in this State as to include any offenses not then cognizable. On the contrary, the tendency in this State in one respect, at least, has been in the other direction.

The statutes of Edw. VI., adopted in 1552, were, at the time we got our common law, in full force against forestallers and regraders. But, notwithstanding the English law had been adopted, by which it was unlawful to buy goods on their way to market; to contract to buy them before they came to market; to make any motion, by word, letter, message, or otherwise, to any person for the enhancing of the price or dearer selling of any goods; to buy up dead victuals of any kind in one market in order to sell them at a higher price later at the same place, or within four miles,—it was found necessary in Virginia to adopt statutes against forestalling and ingrossing food, in order to obtain provisions for the Revolutionary army.

Even more marked has been the progress, or, rather, retrogression, in relation to labor unions. At the time we adopted the English law, the statutes passed in the time of the sixth Edward were in full force, which forbade all conspiracies and covenants of artificers, workmen, or laborers not to make or do their work but at a certain price or rate, under the penalty, on a third conviction, of the pillory and the loss of an ear, and to be taken as a man infamous. There were also in force at that time, unless superseded by the elaborate act of fifth Elizabeth, the statute



of 3 Hen. VI., providing that, "whereas by the yearly congregations and confederacies made by the masons in their general chapters and assemblies the good course and effect of the statutes of laborers be openly violated and broken," the chapters should not be holden, those that caused them to be assembled and holden should be "judged by felons, and punished by imprisonment, fine and ransom." The statute of Elizabeth referred to fixed the hours of work; required all persons able to work, and not possessed of independent means or other employment, to labor on demand; gave power to the justices to fix the rate of wages; and forbade any one to set up or exercise any craft, mystery, or occupation unless he had served an apprenticeship of seven years.

But, so far as we are informed, the right of workingmen to combine for an increase or maintenance of their wages by lawful means has never been held unlawful in this Commonwealth. The statutes of Henry, Edward, and Elizabeth upon that subject, so far as the Kentucky authorities show, have always been as dead as they were in England after the act of 1875.\*\*\*

Says Mr. Bishop (2 Criminal Law, section 233):

"Whatever the language of some of the old cases, no lawyer of the present day would hold it indictable for men simply to associate to promote their own interests, or especially to raise their wages. If the means adopted were mutual improvement of their mental or physical powers, mutual instruction in their methods of doing their work, mutual inquiring and imparting information as to the wages paid in other localities, or any thing else of a like helpful nature, severally enabling the members to obtain higher wages, nothing could be more commendable, and nothing further from the inhib-

ition of the law; or, if employers should combine simply to reduce wages, not proposing any unlawful means, perhaps we might not so much commend them, yet still they would stand under no disfavor from the law,—the result of which is that a conspiracy to enhance or reduce wages is not indictable *per se*, while yet it may be so, by reason of proposed unlawful means.”

And this has been the doctrine recognized in this State.

In *Schulten v. Bavarian Brewing Co.*, 96 Ky., 224, [28 S. W., 504], this court said that it was “not unlawful for several persons in trade to confederate together to protect themselves by lawful acts from dishonest debtors.”

In *Sayre v. Louisville Union Benevolent Association*, 1 Duvall, 145, referring to a New York case, the court said:

“It seems to have been held [in New York] that combinations of workmen to raise their wages are necessarily injurious to trade or commerce and indictable as misdemeanors. . . .

“It seems to be doubtful whether either of these positions is correct. It is entirely consistent with the interests of the public that labor shall be fairly rewarded. If the employer of a number of workmen should refuse to pay them fair wages, why may they not, if bound by no contract, combine for the purpose of obtaining reasonable prices for their labor? We do not perceive that the public would be injured by it, nor any principle upon which it can be condemned as illegal.”

See, also, *Brewster v. Miller's Sons*, 19 Ky. L. R., 593, [41 S. W., 301], citing *Bowen Manufacturing Co. v. Hollis*, 54 Minn., 223, [40 Am. St. R., 319, 55 N. W., 1119].

And in *Hetterman v. Powers*, 19 Ky. L. R., 1087, [43

S. W., 180], in an opinion by Judge Hazelrigg, this court distinctly recognized the doctrine that a laborers' union, formed for the purpose of maintaining wages, might be protected in the use of a label indicating that manufactured goods had been made by members of the union.

We conclude that by the common law of Kentucky it is not an indictable offense to combine for the purpose of maintaining rates of insurance. ...

One other question should perhaps be decided, as necessary to determine what order shall be entered in the circuit court as to the foreign insurance companies when the case goes back. That is the sufficiency of the service of summons upon the Insurance Commissioner. By the statute (Kentucky Statutes, section 631), foreign insurance companies are required to file with the Commissioner a resolution "consenting that service of process upon any agent of such company in this State, or upon the Commissioner of Insurance of this State, in any action brought or pending in this State, shall be a valid service upon said company."

Section 11 of the Criminal Code provides: "A public offense, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the Commonwealth of Kentucky. . . . The proceedings in penal actions are regulated by the Code of Practice in civil actions." Section 9 provides: "All public offenses may be prosecuted by indictment, except offenses of public officers," etc. Chapter 3 of the Criminal Code, on the subject of "Process upon Indictments," provides, in section 147: "The summons shall be issued and served in the same manner as a summons in civil actions."

It is urged that as the consent goes no further than to make the service upon the Commissioner sufficient in an ac-

## Hall v. Commonwealth.

tion, civil or penal, it can not be extended to an indictment, because the action is within the consent given by the company, and the indictment is not.

But we think these statutes, though they might have been better expressed for the purpose, were intended to apply to exactly this class of cases, and to make valid service upon the Commissioner of summons on a misdemeanor indictment, and give jurisdiction of such prosecutions to the Franklin Circuit Court.

For the reasons given, the judgment is reversed, with directions to sustain the demurrer to the indictment.

Guffy, J., dissents, except from that part of the opinion as to service upon the commissioner.

The whole court considered this case.

## CASE 110—INDICTMENT FOR LARCENY—JUNE 15.

## Hall v. Commonwealth.

## APPEAL FROM FRANKLIN CIRCUIT COURT.

1. CRIMINAL LAW—LARCENY—INSTRUCTION NOT PREJUDICIAL.—On the trial of a defendant on the charge of larceny, where the defense is that the defendant found the articles alleged to have been stolen, an instruction in the usual form that to constitute guilt the defendant must be shown to have taken and carried away with felonious intent the stolen articles is not prejudicial, although it ignore the defense set up.
2. CONSTITUTIONAL LAW—HABITUAL CRIMINALS ACT.—The statute prescribing a life sentence for a third conviction of felony is not unconstitutional.
3. SAME—INSTRUCTION.—On the trial of an indictment for larceny where two former convictions are also alleged the defendant is not entitled to a separate finding on the guilt or innocence of the main charge, but the jury should be required to find, under appropriate instructions, the fact of former convictions and fix the increased penalty.

106	894
110	855

106	894
131	740

## Hall v. Commonwealth.

## JOHN W. RAY FOR THE APPELLANT.

1. Appellant was entitled to have a trial on the question of her guilt or innocence on the charge contained in the indictment alone, and without submitting to the jury at the same time proof as to former convictions.
2. The court erred in admitting before the jury copies of judgments of former convictions for grand larceny because they did not come from the proper custodian.
3. The court erred in refusing to instruct the jury on the question of the effect of finding the money and then appropriating it to her own use.
4. The court erred in rendering judgment or pronouncing his sentence for the term of appellant's natural life when the only time fixed by the jury was one year in the penitentiary. The trial jury must fix the term of punishment. Ky. Stats., secs. 1130-1136.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER  
FOR APPELLEE.

1. The habitual criminals act is constitutional.
2. It was incumbent on the jury to find the guilt or innocence of the defendant upon the main charge and also the fact of former conviction. When the verdict was returned, finding the defendant guilty of the crime charged and finding the further fact that she had been twice before convicted of felony, the life sentence followed logically and she was not prejudiced by the judgment of the court in that regard.
3. The defendant was not prejudiced by the ordinary larceny instructions.

Citations: Ky. Stats., sec. 1130; *Stewart v. Com.*, 2 Ky. Law Rep., 386; *Combs v. Com.*, 14 Ky. Law Rep., 245; *Wharton's Crim. Law*, sec. 906.

## JUDGE DURELLE DELIVERED THE OPINION OF THE COURT.

Appellant was found guilty of grand larceny, under an indictment which, in addition to the charge of grand larceny, alleged that she had been twice theretofore convicted of felonies, the punishment of which was confinement in the penitentiary, setting forth the terms and courts at which the former convictions had been had.

The evidence of her guilt was circumstantial. It was shown that the prosecuting witness, having divided his

money, put thirty-two dollars of it in a sock, which he concealed in a tub in the yard of the house where he was staying; that he slept in the same room with appellant, another woman, and two children; that appellant went out in the yard about 4 o'clock in the morning; and made purchases of furniture and other things, and paid her rent, on that day. Evidence was also introduced as to two former convictions, which were both for grand larceny. Objection was made both to the admission of this testimony, and to the unofficial character of the person by whom the records of the former conviction were produced; he being a son of the clerk of the penitentiary, and acting as clerk during the clerk's sickness. Appellant testified to the fact that she found the money, not in a sock, but lying in the path leading through the back yard; that she did not know it was the property of defendant, and, from his statement made the night before, thought he had no money.

The court gave the ordinary instruction as for grand larceny; directing the jury that, if they found her guilty, they should fix her punishment at confinement in the penitentiary for not less than one nor more than five years, and gave in addition an instruction that if they found her guilty under the first instruction, and should further believe that she had been twice theretofore convicted of felony, as charged in the indictment, they should so find and state in their verdict.

The court refused to charge the jury specially as to what they must believe in order to find appellant guilty of grand larceny, if they believed that she found the money. This also is urged as ground for reversal. This question has been already ruled upon by this court,

through Judge Paynter, in *Hester v. Com.*, 16 Ky. L. R., 783, [29 S. W., 875], where it was held that the instruction required the jury to believe that she did feloniously "take, steal and carry away" the money was more favorable to the accused than if the court had instructed specially upon the defense that she had found the money, because, "if the jury believed that she did find the money, they could not find her guilty, under the instructions of the court."

It is earnestly urged that it was error to permit the introduction of evidence of former convictions at all until the jury should have first found her guilty under the charge for which she was then being tried; that it amounted to the admission of testimony to impeach her general character, which she had not put in issue, and enabled the Commonwealth to show her to the jury in the light of a common thief, and rebut the presumption of innocence which the law gives her by evidence in chief upon a trial for grand larceny.

It is painfully apparent that, with the circumstances shown as to the loss of the money, and evidence of two former convictions for grand larceny, the accused, who is an ignorant negro woman, had not the slightest chance that an average jury would entertain a reasonable doubt of her guilt, while, without the evidence of former convictions, there was a possibility that they might do so. There is considerable force, therefore, in the proposition urged, that this procedure denied the accused a fair trial of the offense whereof she was accused. But the statute as to habitual criminals (Kentucky Statutes, section 1130), seems to have created an additional and higher degree of

offense, viz., the commission of a felony, having been theretofore twice convicted of a felony, etc. To show the accused guilty of this degree of the offense charged, it is necessary to show the former convictions; and this, of course, is bound to prejudice the accused,—just as evidence showing malice is bound to prejudice the defendant in a murder case,—but it may be shown to make out the higher degree of the offense, which authorizes the severer punishment. The statute has been held constitutional, and it has been held essential to allege the former conviction or convictions in the indictment. *Stewart v. Com.*, 2 Ky. Law Rep., 386; *Mount v. Com.*, 2 Duv., 93; *Taylor v. Com.*, 3 Ky. Law. Rep., 783; *Boggs v. Com.*, 9 Ky. L. R., 342, [5 S. W., 307].

The statute requires the jury to find the fact of the former convictions. There is no provision for a separate trial of the fact of former conviction, nor do we think the statute intended there should be one. The law seems to work a hardship, but it is a hardship the Legislature alone can remedy.

In *Combs v. Com.*, 14 Ky. L. R., 245, [20 S. W., 268], this court, through Judge Lewis, recognized the legality of this procedure, saying:

"It was distinctly and sufficiently charged in the indictment, and fully proved on the trial, and also found by the jury, that appellant had been twice before the present offense convicted of a felony, the punishment of which is confinement in the penitentiary; and therefore the penalty of confinement in the penitentiary for life became, according to section 12, article 1, chapter 29, General Statutes, [now section 1130, *supra*], inevitable, and the court could do no less than so instruct, and the jury, after finding the present offense a felony, was



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Hall v. Commonwealth.

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bound to render the verdict in pursuance thereof. The validity of that statute has heretofore been sanctioned by this court and it is now needless to discuss the question."

The jury rendered a verdict as follows:

"We, the jury, find the defendant guilty of grand larceny, and fix her punishment at one year confinement in the Kentucky penitentiary. E. M. Wallace, Foreman.

"We, the jury, further find that the defendant was at the April term, 1883, of the Ballard Circuit Court, convicted of a felony, and that said defendant was again at the January term, 1893, of the Franklin Circuit Court, convicted of a felony. E. M. Wallace, Foreman."

It is urged that it was error for the court to sentence the defendant to confinement in the penitentiary for life under this finding, that section 1136 specifically requires the jury by whom the offender is tried to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law.

Upon the other hand, it is insisted for the Commonwealth that by section 1130, it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life, under the provision, "Judgment in such cases shall not be given for the increased penalty, unless the jury shall find from record and other competent evidence the fact of former convictions for felony committed by the prisoner in or out of this State." It is argued therefore, that as said in the Combs Case, *supra*, the life penalty became inevitable and that it was the duty of the court, in rendering judgment, to so fix it.

Differing from the English system, and from that which obtains in the courts of the United

States and in many of the States, our system requires the jury to fix the punishment of the offender, within the limitations prescribed by the statute, and as to such limitations they are instructed by the court. The other system requires the jury only to find the fact of guilt, and the degree of the offense, if it is an offense having different degrees. Upon this verdict ascertaining the fact of guilt, the court proceeds to render judgment within the limitations fixed by the law. Under the old system, the jury have nothing whatever to do with adjusting the punishment to fit the crime. Under our system, it was intended that they should have everything to do with it, so they did not transgress the bounds prescribed. And it may be argued with some plausibility that our system contemplates a consideration by the jury of the punishment to be inflicted under the law, in fixing the degree of the offense of which they find the defendant guilty. It is not our duty to discuss the relative merits or demerits of the two systems. That question is not under discussion. But it is our duty to consider what our own system was intended to effect, and whether a failure to carry out its general design in any particular is prejudicial to any substantial right of the accused whose case is brought before us.

On the trial of a criminal case in the Federal Court, counsel for defense is not permitted to tell the jury what penalty will be imposed if they render a verdict of guilty. In our courts a considerable portion of the argument of counsel for the defendant is frequently devoted to discussing the severity of the punishment, as contrasted with the trivial nature of the offense. Under our system, whether by direct design as to this point, or as necessary to effect another

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Hall v. Commonwealth.

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purpose, it is contemplated, at all events, that the jury should know and say what punishment is to be imposed for the offense of which they find the accused guilty. The statute (section 1136) requires them to fix by their verdict the punishment to be inflicted, within the periods or amount prescribed by law.

It will not do to say that, the fact of two former convictions being ascertained and found by the jury, it is inevitable that punishment by confinement in the peniteneiary for life should follow, and therefore that the court is authorized to so adjudge. If a defendant is found guilty of murder, it is inevitable that he should be hung or confined in the penitentiary for life; but no Commonwealth's attorney would be hardy enough to come to this court expecting to affirm a judgment of confinement for life upon a verdict running, "We, the jury, find the defendant guilty of murder as charged in this indictment." And yet that punishment would be as inevitable from that verdict as it is in this.

Nor is there anything incompatible or conflicting in the two statutes,—sections 1130 and 1136. By the one it is mandatory that, if convicted a third time of felony, the accused shall be confined in the penitentiary during his life. By the other section it is equally mandatory that the jury shall fix the punishment,—just as it is mandatory that the jury shall fix the punishment of murder at confinement in the penitentiary for life, at the lowest.

This is in strict accord with the theory under which the increase of punishment inflicted upon habitual criminals is reconciled to the Constitution. That theory is, as we have said, that a higher grade of offense is created by the statute. The accused is not sent to the peniten-

tiary for life for committing grand larceny, but for the offense of grand larceny after having been twice convicted of felony, the punishment whereof is confinement in the penitentiary.

And so the proper procedure, in order to inflict this seemingly oppressive punishment, is that the jury should find that the accused is guilty of grand larceny; that she has twice theretofore been convicted of a felony, the punishment whereof is confinement in the penitentiary; and that the jury fixes her punishment at confinement in the penitentiary for life.

The contrary view is bound to work hardship and oppression. A jury, in a criminal case, like this, is not presumed to know any law as to that case except that which they are told by the court; for the court is required to give to the jury, in its instructions, all the law of the case. They are properly instructed as to the law of grand larceny. They are also required to find certain facts. As matter of course, it is their duty to find those facts accurately; but they are not told the effect of their finding, nor can they, under such circumstances, be expected to realize the importance of it. Under the instructions as to grand larceny, they find the accused guilty, and fix her punishment at a year's confinement in the penitentiary,—one would think, an ample punishment for stealing thirty-two dollars, under the circumstances as they appear in this case. But they find, in addition,—without dreaming, so far as this record shows, of the effect of that finding,—a fact upon which, according to the Commonwealth's contention, the court inevitably sentences the accused to confinement in the penitentiary for life. It may be urged that, for securing unprejudiced action

by the jury in their finding of such facts, it is better that they should not know the effect of their finding. But our system requires them to know it.

The case of *Chenoweth v. Com.*, (Ky.), [12 S. W., 585], is not incompatible with this view, for there the jury were evidently instructed as to the effect of finding the existence of former convictions. Their verdict showed it. By an error in computation, the jury fixed the punishment at more than this court thought it should have been. The trial court rendered judgment in accordance with the verdict, and this court reversed the case, with directions to render what was considered the proper sentence.

Nor is there any conflict whatever with this doctrine in the recent case of *Herndon v. Com.*, (decided by Judge Hobson), [48 S. W., 989]. There the jury were instructed if they found the defendant guilty, and also found that he had been twice previously convicted, as required by the statute, they should fix his punishment at confinement in the penitentiary for life. Their verdict found him guilty as charged, and fixed his punishment at confinement in the penitentiary for life. It was accordingly held that a substantial compliance with the requirements of the statute as to finding the fact of former convictions had been had, because, under the instructions, the jury could not have fixed his punishment as they did, except by finding the fact of the former convictions.

For the reasons given, the judgment is reversed, with directions to render sentence on the verdict, fixing the punishment at one year's confinement in the penitentiary.

CASE 111—MANDAMUS—JUNE 16.

## Stone, Auditor v. Saunders.

APPEAL FROM FRANKLIN CIRCUIT COURT.

1. JURY—PANEL.—Under section 2243, Kentucky Statutes, providing for the creation of a panel of petit jurors, the panel consists of twenty-four and not thirty jurors.
2. SAME—CERTIFICATE OF THE COURT TO JURY LISTS CONCLUSIVE.—Jurors who are sworn to serve more than one day are entitled to pay under the new statute, and in the absence of anything in the record to rebut the presumption which the order of the court carries with it, the amount ordered by the court to be paid to the jurors will be taken as correct.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER FOR APPELANT.

Under the Act of May 22, 1893, ch. 74., Ky. Stats., the panel of petit jurors consists of twenty-four and not thirty. Ky. Stats., ch. 74, secs. 2243, 2246, 2248; Genl. Stats., ch. 62, art. 2, sec. 1; also art. 4, secs. 1, 2, 3, 4, 5, 6, 7, 8, 9; Ky. Con., sec. 248.

W. L. BRONAUGH FOR APPELLEE.

1. The trustee of the jury fund having paid the jurors under the order of court is not required to lose the money even if the order of court was erroneous.
2. The circuit court has a right under the present jury law to keep a panel of thirty jurors. Ky. Stats., secs. 2243, 2246, 2264.

CHIEF JUSTICE HAZELRIGG DELIVERED THE OPINION OF THE COURT.

The question on this appeal is whether the regular panel of the petit jury, as provided by the act of May, 1893 (chapter 74, Kentucky Statutes), shall consist of twenty-four or of thirty members.

The old law provided that the jury commissioners, at a given term of court should select one hundred persons, or less if so directed by the circuit judge, to serve as petit jurors at the next term of court; and from a box containing the names of

these possible jurors the commissioners "were to draw "the names of thirty persons, one by one, and record the same," etc. This list was to be opened within thirty days of the next term, and the sheriff, at least three days before the first day of the term, was to summon the persons named thereon "to attend on the second day of the term as petit jurors;" and then follows this provision: "The list shall be returned by the sheriff on the first day of the term, with a certificate thereon of the date and manner in which each juror was summoned, from which list twenty-four shall be selected from those summoned in the order in which their names appear thereon, who shall compose the regular panel."

When our lawmakers, in 1893, came to revise the manner of selecting juries, they undertook to gather together or unite the somewhat fragmentary and independent provisions respecting grand and petit juries found in our law, and make the same provisions cover the mode of selecting both grand and petit jurors. After providing for the placing of a number of names, written on slips, in a prescribed drum or wheel case, the provisions of the law pertinent to the question involved here are that the commissioners (section 2242, Kentucky Statutes), or the judge (section 2243, Id.), shall draw therefrom a sufficient number of names to procure twenty persons, qualified, as hereinafter provided, to act as grand jurors, and these names were to be placed in a list, from which list the next grand jury for the county should be impaneled as thereafter directed. The drum or wheel case was then to be revolved or shaken up, and the commissioners were "to draw therefrom, one by one, the names of thirty persons, and record the same," etc., and "from which list of thirty names the next petit jury

for said county should [shall] be selected and impanelled," etc.

The language of section 2243 is, "From the list of twenty names the next grand jury shall be drawn, and from the list of thirty names the next petit jury shall be drawn as hereinafter directed."

Section 2246 then provides for the opening by the clerk of the envelopes containing the two lists, and the summoning of the jurors, and the return of the sheriff; "from which lists, respectively, the regular panels of the grand and petit juries shall be selected in [the] order in which their names appear."

A succeeding section (2248), provides that "a grand jury shall consist of twelve persons," etc., but there is no fixed law fixing the number of the panel of the regular petit jury, although a subsequent section (2252), provides that "a petit jury in the circuit court shall consist of twelve persons."

A provision is also found (section 2247) to the effect that the judge during the term, if the regular panel is for any reason exhausted, may draw from the drum or wheel other persons to act as grand or petit jurors. These provisions seem to be the only ones, either of the old or the present law, possibly affecting the question. It is to be understood at the outset that by the expression "regular panel" is to be meant the number of persons who are to constitute the regular attendance of the court during the term as regular jurors; that is, as the "standing jury." This panel or standing jury, we are to remember, is to be obtained from the list of thirty names, and the names of these standing jurors are to be *selected in the order in which their names appear on the list of thirty*. If, as



contended by appellee, the implication is strong that the entire list of thirty is to constitute the regular panel because the new law omits the words, "from which list twenty-four are to be selected," which are found in the old law, it seems to us clear that this implication must go for nothing when we consider the necessary force of the language, "from which lists [of thirty] the regular panels of the grand and petit juries shall be selected in the order in which their names appear thereon." This is wholly inconsistent with the contention that the regular panel shall consist of the entire list of thirty. At most, the omission of the word "twenty-four" in the law would leave the number not fixed, but it must still be true that the number must be something less than thirty, because it was from the list of thirty, beginning at the top of the list and going down, that the requisite number was to be drawn,—a process bordering on an absurdity if the entire list was to be taken. It would be wholly absurd to say, "Take the panel from the list, but take it in the order in which the names appear on the list," if the entire list was to be selected. The result, appellee contends for—that is, the selection of the entire list—would be obtained as well by commencing at the bottom and going up, or commencing at the middle and going each way. Admitting, then,—and it is true,—that the only conclusive result of our reasoning, based upon the language of the statute, is that the number of the regular panel is something less than the list of thirty, it still remains to find the number that the lawmakers had in view when this statute was enacted. In our opinion, as the number of the regular or standing petit jury had been for very many years, twenty-four, no change was intended. The omission of the number was likely the result of

the attempt to provide in the same clause or sentence for both grand and petit juries. The words "regular panel for the term or standing jury" had come to have, we think, a fixed meaning in the minds of all, and the number, twenty-four, was a part and parcel of that meaning. As the new statute left the number unnamed, we must look to the old law, and the general meaning of the words "regular panel" as crystallized in the public mind, to ascertain the number meant by the lawmakers to compose such panel. The same process must have been resorted to as to the meaning of the words "regular panel of the grand jury" and in the ascertainment of the number to compose it, except that, as the Constitution provided a change from the old number, sixteen, to twelve, the statute, of course, followed the organic law. It is said that when the list of thirty was selected the language of the law is that these thirty are drawn from the drum or wheel "to act as petit jurors;" but the inference can hardly be drawn from this that they were to act whether or no. The old law provided for the names of 100 "to serve as petit jurors," and for a list of thirty, which should constitute "a list of the standing jury," and the sheriff was to summon these thirty to attend "as petit jurors;" nevertheless there were to be only twenty-four who should compose the regular panel. General Statutes, chapter 62, article 4, sections 4-6. The language as to the grand jury in the new law is, "The judge of the court shall draw the names of twenty persons qualified as hereinafter prescribed, to act as grand jurors," etc., and this is but to say that the names of twenty qualified persons were to be drawn "to act as grand jurors." Again in the old law and in the new we are to note as significant

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Cooper v. Commonwealth.

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that a greater number is always provided for attendance on the court than is actually needed. The reason is obvious. Some may be disqualified as grand jurors; some may be disqualified as petit jurors; and others on both lists may fail to attend, or, attending, may be excused. So it is that twenty in the one case and thirty in the other are to be summoned, so that the business may not be delayed by resort to the drum or wheel; and we therefore conclude that the regular panel—the standing jury—for the term shall be composed of twenty-four members.

It does not follow from this, however, that the amount ordered by the circuit court to be paid by the appellee, trustee of the jury fund, to the jurors in attendance at the Jessamine Circuit Court at its March term, 1898, is not to be paid by the appellant. If jurors are sworn, and serve more than one day, they are entitled to pay, under the express language of the statutes; and there is nothing in the record before us to rebut the presumption the order of the court carries with it that the amount due the jurors is correct. It is not material whether the juror, while serving, is called a member of the regular panel or is a bystander. If he serve under the orders of the court, he is entitled to pay.

Judgment affirmed.

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CASE 112—INDICTMENT FOR PERJURY—JUNE 17.

Cooper v. Commonwealth.

APPEAL FROM ROWAN. CIRCUIT COURT.

**CRIMINAL LAW—PERJURY.**—On the trial of an indictment for perjury alleged to have been committed by the defendant in asserting his innocence upon a previous trial for a misdemeanor,

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Cooper v. Commonwealth.

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his acquittal on the former trial is conclusive against the falsity of such testimony.

**A. T. WOOD AND R. BLAIR FOR THE APPELLANT.**

The evidence in this case is insufficient to convict the appellant of perjury. The facts proven are consistent with his innocence, and certainly it can not be said that the falsity of his testimony was established either by two witnesses or by one witness with strong corroborating circumstances. *Com. v. Davis*, 92 Ky., 461; *State v. Massy*, 86 N. C., 659.

(No brief on file for appellee).

**JUDGE BURNAM DELIVERED THE OPINION OF THE COURT.**

The appellant and one Libbie Purvis were jointly indicted in the Rowan Circuit Court for the offense of adultery. The trial under that indictment resulted in a verdict of acquittal for appellant. The grand jury of Rowan county thereupon reported this indictment against him in which it is charged that upon the trial of appellant and Libbie Purvis upon the charge of adultery "he did knowingly, willfully, and corruptly swear that he had not had carnal sexual intercourse with Libbie Purvis, when same was false and untrue, and was known by him to be false and untrue." The trial under this indictment resulted in a verdict of guilty, and a judgment sentencing appellant to confinement in the penitentiary, which we are asked upon this appeal to reverse.

The principal question to be considered is the effect which is to be given to the indictment, trial, verdict and judgment of acquittal of appellant under the indictment for adultery, as it is manifest that appellant can not be guilty in this case if he was innocent of the charge contained in the indictment.

His guilt or innocence of the offense of having had carnal sexual intercourse with Libbie Purvis was the exact question which was tried in the first

proceeding, and as a result of that trial the defendant was found not guilty. In order to convict him in this case, it was necessary for the jury to believe that he was guilty of the identical offense for which he had been tried and acquitted under the other indictment, as it is evident that, if he was innocent of having had carnal sexual intercourse with Libbie Purvis, he was not guilty of false swearing when he stated that he had not had such intercourse with her. We therefore have, as a result of the trial of appellant under these two indictments, a verdict and judgment finding him not guilty of the offense of having had carnal sexual intercourse with Libbie Purvis, and in the second case a verdict and judgment finding him guilty of false swearing when he testified that he had not had such intercourse with her; in other words, the first jury found him innocent of the misdemeanor with which he was charged, and the second jury found him guilty of a felony because he testified that he was not guilty of such misdemeanor. It certainly was never intended that the enginery of the law should be used to accomplish such inconsistent results. It appears to us from the conflicting character of the testimony in the case upon the question of defendant's guilt or innocence that a verdict of the jury might have been upheld in the first case whether it found one way or the other, but certainly the finding of the jury must be conclusive of the fact considered as against the Commonwealth, and preclude any further prosecution which involves the ascertainment of such fact.

A question analogous to the one at bar was considered in the case of Coffey v. United States, 116 U. S., 436, [6 Sup. Ct. 437], the facts in which case are about as follows: Coffey was a distiller, and was proceeded against under a section of the statute

for defrauding, or attempting to defraud, the United States of the tax on spirits distilled by him, and the copper stills and other distillery apparatuses used by him and the distilled spirits found on his distillery premises were seized. One section of the statute provides, as a consequence of the commission of the prohibited act, that this certain property should be forfeited, and that the offender should be fined and imprisoned. Coffey was first proceeded against on the criminal charge, and acquitted. Subsequently a proceeding to enforce the forfeiture against the *res* was instituted. The defendant in the proceeding *in rem* relied upon his acquittal under the criminal charge, and Judge Blatchford, in delivering the opinion of the court, said:

"Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem*. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States in the suit *in rem*. Nevertheless, the fact or act has been put in issue, and determined against the United State; and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it."

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Cooper v. Commonwealth.

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And the conclusion reached in that case is in consonance with principles laid down by the United States Supreme Court in the case of *Gelston v. Hoyt*, 3 Wheat., 246.

In the case of *Rex v. Duchess of Kingston*, 20 Howell, St. Tr. 355 and 538, the court held:

"The judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or, as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court."

And in the case of *United States v. McKee*, 4 Dill., 128, [Fed. Cas. No. 15,688], the defendant had been convicted and punished under a section of the Revised Statutes for conspiring with certain distillers to defraud the United States by unlawfully removing distilled spirits without the payment of taxes thereon. He was afterwards sued in a civil action by the United States, under another section, to recover a penalty of double the amount of the taxes lost by the conspiracy and fraud. The court held that the two alleged transactions were but one, and that the suit for the penalty was barred by the judgment in the criminal case. The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty.

And Judge Van Fleet, in his *Treatise on the Law of Former Adjudication* (page 1242, sec. 628), says:

"If there is a contest between the State and the defendant in a criminal case over an issue, I know of no reason why it is not *res judicata* in another criminal case;" citing a number of American decisions in support of the text.

Appellant in this case had already been tried and acquitted of the offense of having had carnal

sexual intercourse with Libbie Purvis, and the judgment in that case is *res judicata* against the Commonwealth, and he can not again be put on trial where the truth or falsity of the charge in that indictment is the gist of the question under investigation. It therefore follows that appellant was entitled to a peremptory instruction to the jury to find him not guilty.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

JUDGE HOBSON DISSENTS. JUDGE PAYNTER CONCURRING IN THE  
DISSENT.

Appellant, when indicted for adultery with Libbie Purvis, secured an acquittal by swearing falsely that he had not had carnal intercourse with her; and being indicted and convicted of false swearing in giving this testimony, it is held that because he was acquitted in that case he can not be punished for the crime thus committed. In other words, it is held that if the defendant in a criminal case will swear to enough to secure an acquittal, and does in this manner get a verdict in his favor in that case, he can not, although clearly guilty, be punished for the perjury or false swearing by means of which he defeated justice. Such a rule puts persons charged with crime, when testifying for themselves, on a different plane from other witnesses and offers an incentive not only to perjury on their part, but to the corruption of justice in other ways to secure a verdict in their favor which will protect them from punishment for both the offense for which they are tried and the perjury committed on the trial. It is certainly anomalous to say that if a criminal attempts by perjury to secure an acquittal and fails in the attempt, he may be punished



but that if he is successful, no punishment  
ed. Undoubtedly it would seem that there  
st, as sound reason for punishing this grave  
where the ends of justice have been thereby de-  
ted as where the effort to defeat justice has proved  
abortive.

In Freeman on Judgments, sec. 318, it is said:

"The principles applicable to judgments in criminal cases are, in general, identical, so far as the question of estoppel is involved, with the principles recognized in civil cases. An acquittal or a conviction, under an indictment for any offense, is a bar to any subsequent indictment substantially like the former. But in criminal as in civil actions, it is essential that the judgment be on the merits, and not tainted with fraud. Thus going into a favorable court, and submitting to a conviction, in order to escape a severe penalty, is no bar to a *bona fide* prosecution."

The rule as to collateral attack on judgments in civil cases for fraud is thus stated in 12 Amer. & Eng. Ency. of Law, 147-s:

"It is a general rule at common law that parties and privies to a judgment may not impeach it collaterally for fraud, though it seems they may prove that the judgment is being fraudulently used for a different purpose than that intended, or that it is based upon a paper fraudulently obtained. This rule has, however, been held inapplicable where no appeal lies from the judgment."

When there is no appeal; and no other way to set aside a judgment obtained by fraud, to hold it conclusive when offered in bar of another action is to allow the wrongdoer to profit by his own wrong. Thus, in *Newcomb's Executor's v. Newcomb*, 13 Bush, 544, [26 Am. Rep., 222]

the defendant could not appeal from the judgment, move for a new trial or file a petition to set aside, and this court, sustaining her right to treat the judgment as void when offered in another suit in bar of her action, said:

"Recognizing the general doctrine that judgments of courts of general jurisdiction are not the subject of an attack in a collateral proceeding, it becomes necessary to determine whether this rule, or the reasons upon which it is based, is to be applied to the case before us.

"The rule had its origin from motives of public policy, sustained, as all the authorities conduce to show, by the additional reason that the party aggrieved has every opportunity offered him for redress if wrong has been committed; he may appeal, move to set aside the judgment or for a new trial, so long as the court rendering the judgment has any control over it. He may also file his petition to review the judgment, or a petition for a new trial. Such proceedings the policy of the law requires he shall adopt, and will not permit collateral attacks upon such judgments when they may be offered as evidence, or relied on as the final determination of the rights of the parties."

On the same principle, foreign judgments may be avoided for fraud in their obtention, for the reason that there is no other way to correct the matter, and that the ends of justice require this. (Freeman on Judgments, sec. 591.)

In a criminal case the State can not obtain a new trial for newly-discovered testimony after the term, and if the judgment bars a prosecution of the defendant for his wilful perjury, whereby he obtains it, there is no remedy. The ends of justice have not only been defeated,

but the foundations of judicial proceedings have been sapped.

The rule, stated by Mr. Freeman above that a judgment rendered in an inferior court to which the defendant voluntarily goes to escape a severer penalty is not a bar to a subsequent prosecution for the same offense, rests on the ground that he thus perpetrates a fraud on the State, and has been followed by this court in *Carrington v. The Commonwealth*, 78 Ky., 83. The fraud in this class of cases is in giving the court jurisdiction; but certainly fraud of this sort is less tolerated in the eye of the law than the abhorred crime of perjury, cheating the court out of the truth, after its jurisdiction has lawfully attached.

In *State v. Swepson*, 79 N. C., 632, the defendant had, by imposition on the court, had a jury impaneled and a formal verdict of not guilty entered, on the ground that the matter had been compromised with the State. This was held no bar to another trial under the same or another indictment. The court said:

"The State ought to have some remedy. Guilt can not be allowed to protect itself by fraud and corruption, or else the tribunals of justice become dens of thieves, and law as administered in them is a machine to punish the weak and screen the powerful. . . . There is a remedy not without precedent or authority for its use, plain, and not of infrequent use, laid down in the elementary works on law, and supported by the adjudications of respectable courts. This remedy is in the court in which the trial was had, and is independent of any action of this court. It is asserted in many text books and dicta of judges and supported by some decisions, that a verdict of acquittal on an indictment for a misdemeanor

procured by the trick or fraud of the defendant, is a nullity, and may be treated as such; and the person acquitted by such means may be tried again for the offense of which he was acquitted. 3 Greenl. Ev., sec. 38; 1 Wharton, Criminal Law, sec. 546; 3 Ibid, sections 3221-3222; 1 Chitty, Criminal Law, 657."

If the defendant, where his constitutional right not to be put in jeopardy a second time for the same offense is not involved, may be estopped, by reason of his own fraud in procuring the judgment, from relying on the plea of *res adjudicata*, how much the more should he be estopped to make this plea to escape punishment for the crime of perjury by means of which he obtained the judgment. There is not a shadow of doubt of appellant's guilt in the case before us, and not to punish him is to lose sight of the principles on which the rule relied on rests.

The opinion is based on the ground that the question whether appellant had had sexual intercourse with Libbie Purvis was litigated and determined on the trial of the indictment against him for adultery, and that the State is concluded by the judgment in that case from litigating with him again this precise question on a charge of false swearing on that trial. None of the authorities cited by the court sustain this conclusion; nor is it sustained by the principles on which the doctrine of *res adjudicata* rests. It rests after all on public policy and convenience. Its design is to protect courts of justice and secure for them respect. It is court-made law and, like other common law principles, is not to be stretched beyond its reason. The purpose of the rule is to promote the orderly administration of justice, not defeat it. It rests on the ground that the law having provided

certain processes for the correction of errors or defects in judgments, the ends of justice require that these should be followed. But it was never intended to assail the right of the courts to protect the administration of justice from perjury, a right which all courts must of necessity possess if judicial proceedings are not to become a solemn farce. Neither the reason, purpose nor spirit of the rule permits its application in such a manner as to destroy respect for courts of justice or make them impotent to punish crime.

For these reasons I dissent from the conclusion reached by the majority of the court.

This dissent which was announced at the time was, by an oversight, not filed before.

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CASE 113—INDICTMENT FOR HORSE STEALING—JUNE 17.

Gilbert v. Commonwealth.

APPEAL FROM OWEN CIRCUIT COURT.

1. CRIMINAL LAW—INDICTMENT FOR HORSE STEALING—INSTRUCTIONS.—Upon the trial of an indictment for horse stealing it is error to instruct the jury to convict if the defendant received the horse knowing it to have been stolen.
2. SAME—MISCONDUCT OF THE COMMONWEALTH'S ATTORNEY.—It was misconduct of the Commonwealth's Attorney to state to the jury in his argument, (first), that when a defendant was brought to trial for horse stealing, he always had an affidavit as to what two or three mythical witnesses would state that nobody knew, although in this case James Renfrow and William Hedger were actual persons; (second), that he could if he had the witnesses prove by fifteen or twenty as good men as lived in the New Liberty precinct that William Keefe and George See were in the neighborhood until 11 o'clock that Saturday night and that he could prove a perfect alibi for William Keefe and George See; (third),

## Gilbert v. Commonwealth.

that when J. L. Piner testified at the examining trial, this defendant found out that his story to S. D. Duvall, the sheriff, would not work and he changed it; (fourth), that he had here somewhere the minutes of the examining court and that the said minutes would show that J. L. Piner testified at the examining court to all that he testified to in this trial," when the fact was that J. L. Piner only testified before the grand jury; and this misconduct of the Commonwealth's Attorney was not cured by the court stating to the jury "you will consider only the proof before you."

3. EVIDENCE.—Defendants jointly indicted with the appellant and to whom a separate trial had been awarded, were competent witnesses against the appellant.
4. CRIMINAL LAW—INSTRUCTIONS AS TO ACCOMPLICES.—The court should have instructed the jury that appellant could not be convicted by the testimony of Keefe and See, since both of them were jointly indicted with him.

## LINDSAY &amp; BOTTS FOR THE APPELLANT.

1. The court erred in overruling the appellant's motion to set aside the indictment herein because section 120 of the Criminal Code was not complied with, in that the name of John Lonecker, a witness who was examined by the grand jury which found and returned the indictment herein, was not written at the foot of or on the indictment herein. Criminal Code, sec. 120; Sutton v. Com., 17 Ky. Law Rep., 186.
2. The court erred in overruling the demurrer of the appellant to the indictment herein for the following reasons, viz.:
  - (a) The indictment charges that this appellant with others, Wm. Keefe and George See did in Owen County "feloniously confederate, conspire and agree together to take, steal and carry away from the possession of Noah May, the owner, one bay horse about four years old, of the value of \$50.00," but fails to charge that which was by the parties charged to be done was done in the county or circuit in which the indictment charges the conspiracy, or confederation, or agreement was done, or had, or made; that is to say, that the indictment while alleging the county and circuit in which the conspiracy was made does not allege the county or circuit in which any acts were done in pursuance to the conspiracy, confederation or agreement.
  - (b) The indictment does not lay the venue of the offense charged in the indictment.
  - (c) In view of the instruction given by the court to the jury in and upon the trial of the appellant the indictment is fatally defective in that, it does not by the most remote inference at-

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Gilbert v. Commonwealth.

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tempt even to join with the offense as prescribed or denounced by section 1195, Kentucky Statutes, the offense denounced or prescribed by section 1199 of the Kentucky Statutes. Criminal Code, sec. 124; Ky. Stats., secs. 1195, 1199.

3. The court erred in overruling the motion of appellant for a continuance of this case on account of the absence of the witnesses James Renfrow, Wm. Hedger and Wm. Hearne, especially so when the exceptions to the Commonwealth's Attorney's remarks in regard to the affidavit to the jury as shown by the bill of exceptions are considered.
4. The court erred in overruling appellant's motion for a peremptory instruction.
5. The court erred in permitting the witnesses Wm. Keefe and George See, or either of them, to testify against this appellant, each and both being charged and jointly indicted with this appellant. Crim. Code, secs. 223, 232, 234; Kidwell v. Com., 97 Ky., 538; Thompson v. Com., 16 Ky. Law Rep., 168.
6. The court not only erred in permitting witnesses Wm. Keefe and George See to testify, but did commit a greater error by saying to them and each of them in the presence and hearing of the jury that they and each of them need not answer any question which would criminate them or either of them.
7. The court erred in permitting the witnesses Wm. Keefe and George See to answer, and the Commonwealth, by her attorney, to propound to them and each of them the questions and answers as shown by the bill of exceptions.
8. The instructions Nos. 1, 2 and 3 given to the jury as the whole law of the case are not in fact the whole law of the case, but they contain very little of the law which should govern this case and are not only misleading, but are in the very teeth of the law. Ky. Stats., secs. 1195, 1199.
9. The statements of the attorney for the Commonwealth made to the jury in his closing argument were without foundation in fact, supported by no proof, were very hurtful to this appellant and did much to prevent a fair and impartial trial.
10. The newly discovered evidence shown by the affidavit of Noah May, the owner of the horse which was by the indictment alleged to have been stolen is of itself sufficient to authorize a reversal of this case. Massie v. Com., 16 Ky. Law Rep., 790.
11. The verdict and judgment both and each are not only not supported by, but are palpably against the evidence.

W. S. TAYLOR, ATTORNEY-GENERAL, AND M. H. THATCHER  
FOR APPELLEE.

Counsel discussed *seriatim* the propositions of law urged for reversal and cited to the tenth point. Crim. Code, sec. 281.

## JUDGE GUFFY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from a judgment of the Owen Circuit rendered upon a verdict against the appellant upon an indictment charging him and others with the offense of horse-stealing. Numerous grounds were filed in support of the motion for a new trial, and the same having been overruled, appellant asks a reversal on account of various errors of the trial court.

We deem it unnecessary to notice in detail the several reasons assigned for reversal.

Appellant complains of Instruction No. 1 given by the trial court. The instruction is not as clear as should have been. It is open to the construction that it authorized the jury to convict if appellant received the horse knowing it to have been stolen.

Appellant was not accused of this offense, and the jury was not authorized to find him guilty of the offense charged unless he stole the horse either by himself or in company with others, and the instruction should have so told the jury.

Appellant had moved for a continuance on account of the absence of several witnesses, which motion was overruled; but his affidavit was allowed to be read as the deposition of the witnesses.

It appears that during the argument of the Commonwealth's Attorney, in closing the case to the jury, the following occurred: He said to the jury: "When a defendant was brought to trial for horse-stealing they always had an affidavit as to what two or three mythical witnesses would state that nobody knew, [the defendant objected, and the Commonwealth's Attorney then added.] although in this case James Renfrow and William Hedges



are actually persons." To all of which defendant at the time excepted and still excepts.

The Commonwealth's Attorney, in the same argument, stated to the jury as follows: "I could if I had thought it necessary prove by fifteen or twenty as good men as live in New Liberty precinct that Wm. Keefe and George See were in New Liberty until eleven o'clock that Saturday night, and could prove a perfect alibi for Wm. Keefe and Geo. See."

"The defendant objected, and the court said to the jury that you are to consider only the proof before you, to all of which the defendant at the time objected and excepted and still excepts."

The Commonwealth's Attorney, in the same argument, stated as follows: "That when J. L. Piner testified at the examining trial this defendant found out that his story to S. D. Duvall, the sheriff, would not work, he changed it."

"The defendant objected, and the court said: 'You will consider only the proof before you.' To all of which the defendant at the time objected and excepted and still excepts."

The Commonwealth's Attorney stated to the jury in the same argument as follows: "I have here somewhere the minutes of the examining court, and that the said minutes will show that J. L. Piner testified at the examining court to all that he testified to in this trial;" when the fact was, and is, that J. L. Piner only testified before the Grand Jury. The Commonwealth said: "Perhaps that is so, but I saw it somewhere in the record."

"The defendant objected, and the court said to the jury: 'You will consider the proof before you.'"

Under the evidence in this case and the circumstances

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Gilbert v. Commonwealth.

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surrounding the trial, the remarks and statements of the attorney for the Commonwealth were almost certain to be very prejudicial to the appellant and ought not to have been made. The ruling of the court in respect thereto could not prevent the injury to the defendant naturally resulting from the statements complained of.

It is earnestly insisted for appellant that Keefe and See, who were jointly indicted with appellant, and to whom a separate trial had been awarded, were not competent witnesses against appellant. It is true that in *Edgerton v. Commonwealth*, 7 Bush, 143, this court held that a party jointly indicted with another could not be allowed to testify for the Commonwealth, but that decision was placed upon the ground that such person could not testify for the defendant. But that decision was rendered before the enactment of the law allowing the defendants in criminal cases to testify in their own behalf and in behalf of each other. The law now permits defendants in all cases to testify in behalf of themselves and for each other. It seems clear now that such defendants may testify for the Commonwealth if they are willing to do so. The testimony of Keefe and See was competent so far as it conduced to show the guilt of the appellant, but no further.

The court, however, should have instructed the jury that appellant could not be convicted alone upon the testimony of Keefe and See, both of them being charged with the same crime, and in law at that time should have been treated as accomplices.

For the reason indicated the judgment is reversed and cause remanded with directions to award appellant a new trial, and for proceedings consistent herewith.

# INDEX.

## ACTIONS—

- Action Under Section 4, Kentucky Statutes.—Under section 4 of the Kentucky Statutes, an iron bar is a deadly weapon. *Morehead's Admx. v. Bittner, &c.* ..... 523

## ADVERSE POSSESSION—

1. As long as the vendee looks to his vendor for a title, his possession is not adverse to the vendor, and he can not avail himself of such possession to prove his title. *Creech, &c., v. Abner, &c.* ..... 239
2. Same—Evidence.—In an action to foreclose a mortgage against a defendant whose title is by adverse possession, evidence that the defendant held under a title bond from his vendor and claimed the land as owner is incompetent to establish a title by adverse possession. *Idem.* ..... 239

## APPEALS—

1. Adjustment of Equities Arising by Balancing Errors.—An error of \$200 in the claim of the assignee against the assignor for rent of the assigned premises will be paid to the assignor out of the reduction in the allowances to the assignee and his attorney. *McNamara, Assignee, &c. v. Schwaniger* ..... 1
2. Parties.—The error complained of that the value of the potential right of dower of the assignor's wife was not estimated and paid to her will not be considered, she not being a party to the appeal. *Idem.* ..... 1
3. Parties.—It seems a residuary devisee may appeal from a judgment partitioning the lands of his testator without joining the personal representatives; but whether so or not the joinder of the personal representative in the appeal will cure the omission. *King, &c., v. Middlesborough Town Lands Co., &c.* ..... 72
4. Act of March 14, 1898.—An appeal granted by the clerk of this court after the act of March 14, 1898, went into effect, from a judgment rendered before the passage of that act, is subject to the provisions of the act; and unless the amount exceeds \$200 exclusive of interest and costs, this court has no jurisdiction. *Hale v. Grogan* ..... 311
5. Same—"Exclusive of Interest."—The language of the act "exclusive of interest" excludes interest which accrued prior to the rendition of the judgment. *Idem.* ..... 311
6. Bill of Exceptions.—Upon the former appeal in this case the bill

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 Appeals—Attorneys.
 

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## APPEALS—Continued.

- of exceptions was stricken from the record because it had not been filed in time. Upon the second trial of the case this bill of exceptions was by consent read as evidence. Upon this appeal the certificate of the clerk shows that this record together with what was copied on the former appeal constitutes a complete transcript of all the proceedings in the case. It is thereupon held that the motion to strike the bill of exceptions from the transcript should be overruled. *Turner, &c., v. Johnson*.....460
7. Immaterial Error.—The finding of the jury that there has been no damage for breach of contract makes any error in the criterion of damage immaterial. *Taulbee v. Moore*. ....749

## ASSIGNMENTS—

1. Assignments for the Benefit of Creditors—Excessive Allowance.—Where the services rendered by the assignee for the benefit of creditors consisted in a sale of a single piece of real estate and thirty shares of stock in a building and loan association in one lot, an allowance of \$275 to the assignee for his services and of \$250 to his attorney was excessive. A reduction of one hundred dollars in each allowance would make the allowance to attorney and assignee reasonable. *McNamara, Ass'nee, &c., v. Schwaniger* ..... 1
2. Application of Payments—Made by Assignor Before Assignment.—Where a bank held a mortgage of corporate property valid as to other creditors to the extent the corporation could legally create a debt and invalid as to the excess, general payments made by the assignor prior to the assignment will be credited on the unsecured indebtedness, the entire claim being valid as to the assignor itself. *Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.* ..... 7
3. Same.—Payments made by the assignee after assignment in such a case will be credited on the secured debt. *Idem.* ..... 7
4. Assignment for Benefit of Creditors—Insurance Policy.—Until a policy of insurance has been carried to a point where under the terms of the policy itself it has a value, it does not pass to an assignee for the benefit of creditors under a general clause embracing "any property, accounts or claims not herein mentioned." *Barbour's Admr. v. Larue's Ass'nee, &c.*.....546

## ATTORNEYS—

- Misconduct of.—It was error, if objected to, to permit counsel for the plaintiff to state to the jury his reasons for not bringing as witnesses the members of the family attesting a signature to prove the genuineness of the signature. *Cunningham's Admr., v. Speagle*. ....278

## Banks—Bond.

## BANKS—

**Sending Money by Mail.**—It is the duty of a bank to which a check has been transmitted by mail with directions to send cash for same, to send the money by registered and not by ordinary mail; and when the money is lost by reason of such failure the bank is liable. *Clay City National Bank v. Conlee* .....786

## BILLS AND NOTES—

1. **Pleading—Petition.**—In an action by an indorsee on a bill of exchange it is not necessary to allege specifically that the endorsement was to the plaintiff. A promise by the acceptor to pay, an indorsement by the payee and that the plaintiff is the owner and holder thereof is sufficient because such averments import a promise by the indorser to pay. *Lyddane v. Owensboro Banking Co.* .....707
2. **Same—Notice of Dishonor—Effect of Section 3725, Kentucky Statutes.**—Failure of the holder of a bill of exchange to cause notice of dishonor to be given to a prior indorser does not release a subsequent one to whom such notice was given. Section 3725, Kentucky Statutes, did not operate to repeal the common law in this regard, but merely to change the method of giving notice required by the law merchant. *Idem.*.....707

## BOND—

1. **Supersedeas—Damages On.**—In an action on a supersedeas bond given to stay a judgment for the recovery of shares of stock in a manufacturing corporation, the plaintiff can recover damages resulting from a deterioration in the value of the stock caused by mismanagement by the directors. *Welch v. Welch* .....406
2. **Same—Attorney's Fees.**—Attorney's fees incurred in prosecuting an appeal do not constitute an element of damage in an action on the supersedeas bond. *Idem.* .....406
3. **Construction of.**—By the bond in suit, the appellee bound himself to pay the appellants a reasonable and fair rent of the property during the time the appellants were kept out of its possession and any damages they sustained from waste or injury to the property during the time. Under this covenant the appellants were entitled to recover first, the reasonable rental, and second, the waste committed while appellee remained in possession. *Turner, &c., v. Johnson* .....460
4. **County Levy—Liability of Surety on General Official Bond.**—The sureties in a sheriff's official bond are liable for the county levy collected by him and not paid over. (*Howard, Sheriff, v. Com., 105 Ky., 604.*) *Pulaski County v. Watson, Sheriff.*.....500

## Building and Loan Associations.

## BUILDING AND LOAN ASSOCIATIONS—

See Usury, 1.

1. Building and Loan Associations—Liquidation—Rights of Withdrawing Members. In the liquidation of the affairs of an insolvent building and loan association members who have given notice of withdrawing more than thirty days before the assignment are not entitled to priority in the distribution of assets. By-laws declaring the rights of withdrawing members and section 860 of the Kentucky Statutes are limited in their application to going concerns. *Reddick, &c., v. The United States Bldg. & Loan Ass'n's Ass'nee* ..... 94
2. Same—Jurisdiction to Foreclose Mortgage.—In an action to liquidate the affairs of an insolvent building and loan association the court has no jurisdiction to foreclose a mortgage on land situated in another county. *Idem.* ..... 94
3. Same—Settlement with Borrowing Members.—In settling with borrowing members of an insolvent building and loan association, the borrower is to be charged with the amount of his loan and legal interest and credited by his payments of premium and interest on a partial payment basis, and where the value of his stock is shown by him with reasonable certainty, he should be credited with that also. *Idem.* ..... 94
4. Same—Expense of Operating.—A member of a going building and loan association is not chargeable with his proportionate share of the expense of carrying on the business, the profits of the investment being set off against the expense of operating; and the date of his ceasing to pay is a starting point for a new principal upon which interest is to be computed, without any charge of expense. *The Safety Bldg. & Loan Co. v. Ecklar* ..... 115
5. Same—Expenses.—Where a going building and loan association, in a contest for the enforcement of a borrowing member's mortgage, makes it appear with reasonable certainty that the profits or dividends distributable to a borrowing member's stock are not sufficient to cover his proportionate share of expenses, and losses in running the business, it may recover of such borrower his proportion of such expenses and losses; but in estimating such losses it must appear that they do not include losses incurred in having to repay usury to its borrowing members. *Peoples' Safety & Bldg. Ass'n v. Denton* ..... 186
6. Same—Liquidation—Common and Preferred Stock.—In the liquidation of the affairs of an insolvent building and loan association the preferred stock is not entitled to preference over the common stock in the distribution of assets in the absence of an express provision of the charter to that effect, the preference

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Building and Loan Associations—Commonwealth Attorney.

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**BUILDING AND LOAN ASSOCIATIONS—Continued.**

- being limited to dividends alone in a going concern. Sumrall, &c., v. Commercial Bldg. Trust's Ass'nee .....260
7. Same—Withdrawing Stockholders Not Creditors.—In the liquidation of the affairs of an insolvent building and loan association, the holder of paid-up stock who has given notice of withdrawal prior to the assignment will not be entitled to preference over the holders of installment stock. Forwood v. Eubank, Ass'nee, &c. ....291

**CLAIMS AGAINST THE STATE—**

See Judgments, 2.

**COMMON LAW—**

1. Conflict of Laws—Common Law Presumed.—In the absence of allegation and proof the common law will be presumed to be in force in New York. Bank of Commerce of Buffalo, N. Y., v. Windmuller, &c. ....395
2. Same—Preferences Valid at Common Law.—A transfer of property by an insolvent debtor in New York to a creditor in that State with the intent to prefer will be held valid in the absence of allegation and proof that the common law has been changed in that regard. *Idem.* ....395

**COMMONWEALTH'S ATTORNEY—**

1. Duty, of.—The Commonwealth's Attorney is a *quasi* judicial officer and should aid the court in keeping from the jury all testimony which the court has ruled to be incompetent. He should present the Commonwealth's case fairly and should not press upon the jury any deductions from the evidence which are not strictly legitimate. His object, like that of the court, should be simply justice. Baker v. Com. ....212
2. Same.—It was misconduct of the Commonwealth's Attorney to state to the jury in his argument (first), that when a defendant was brought to trial for horse stealing, he always had an affidavit as to what two or three mythical witnesses would state that nobody knew, although in this case James Renfrow and William Hedger were actual persons; (second), that he could, if he had the witnesses, prove by fifteen or twenty as good men as lived in the New Liberty precinct, that William Keefe and George See were in the neighborhood until 11 o'clock that Saturday night and that he could prove a perfect alibi for William Keefe and George See; (third), that when J. L. Piner testified at the examining trial, this defendant found out that this story to S. D. Duvall, the sheriff, would not work, and he changed it; (fourth), that he had here somewhere the minutes of the ex-

## Commonwealth Attorney—Constitutional Law.

## COMMONWEALTH ATTORNEY—Continued.

amining trial and that the said minutes would show that J. L. Piner testified to in this trial," when the fact was that J. L. Piner only testified before the grand jury; and this misconduct of the Commonwealth's Attorney was not cured by the court stating to the jury "You will consider only the proof before you." *Gilbert v. Com.* .....919

## CONFLICT OF LAWS—

*Law of Forum Construing Bond.*—In the absence of allegation and proof that under the laws of Missouri where the bond was executed, a different effect is to be given to it from that under the laws of Kentucky, the presumption will be indulged that the law of the place of the contract is the same as the law of the forum. *Turner v. Johnson* .....460

## CONSPIRACY—

See Insurance, 9.

## CONSTITUTIONAL LAW—

See Navigable Streams, 2.

1. *Due Process of Law.*—A notice posted at the court house door for five days to the unknown owners of impounded stock, followed by five days' advertisement of the sale of same, describing the stock, is "due process of law" and a sale pursuant to such notice and advertisement is valid. *Armstrong v. Brown, &c.* ..... 81
2. *Municipal Ordinance Imposing License Fee.*—Under sections 174 and 181 of the Constitution, section 3011 of the Kentucky Statutes, conferring authority upon cities of the first class to require casualty and indemnity companies to pay into the sinking fund not less than two dollars nor more than three dollars on every one hundred dollars of premiums received on business during the previous year, is a valid exercise of power; and an ordinance enacted pursuant to such section of the Statutes is valid. *Fidelity & Casualty Co. v. City of Louisville, &c.* .....207
3. *Same—Vested Rights.*—No complaint from Parties not Affected.—A municipality will not be heard to complain of the invalidity of an act taxing its waterworks franchise on the ground that it divests vested rights of the holders of city bonds. *City of Newport &c. v. Com.* .....434
4. *Long and Short Haul.*—Competition at Terminus of Long Haul.—Competition at the terminus of the long haul does not prevent the carriage from being "under substantially similar circumstances and conditions" within the meaning of that language in section 218 of the Constitution. (The principles of the case



## Constitutional Law—Contracts.

## CONSTITUTIONAL LAW—Continued.

- L. & N. R. R. Co. v. Com., reported in 104 Ky., 226, re-affirmed.)  
 Louisville & Nashville R. R. Co. v. Com. .... 633
5. Effect of Section 163.—Section 163 of the Constitution does not confer a right upon a telephone company to use the streets of a municipality for telephone purposes without municipal consent, unless (1) the right existed by charter antecedently and (2) that work had been begun thereunder in good faith. Neither condition existed in this case. E. Tenn. Tel. Co., &c., v. City of Russellville ..... 667
6. Special Resolution Authorizing Suit Against the Commonwealth.—A joint resolution authorizing named persons to sue the Commonwealth on certain claims in the Franklin Circuit Court is not a violation either of (1) section 231 of the Constitution or (2) section 59, inhibiting special legislation where a general law can be made applicable. Such a resolution is not a "law" within the meaning of either section. Com. v. Haly, &c. .... 716
7. Parole Act.—The act of May 2, 1888, conferring on the Commissioners of the Sinking Fund the power, under certain conditions, to parole convicts, is not unconstitutional either (1) as an infringement of executive prerogative, or (2) as a violation of the constitutional requirement that convicts shall be confined within the walls of the penitentiaries. George, &c., v. Lillard, Warden ..... 819
8. Habitual Criminals Act.—The statute prescribing a life sentence for a third conviction of felony is not unconstitutional. Hall v. Com. .... 894

## CONTRACTS—

See Evidence, 7, 8; Damages, 8.

1. Evidence to Explain Latent Ambiguity.—In an action on a contract whereby one building and loan association assumed the contracts entered into by another such association, in a suit by a stockholder of the corporation making the assignment against the corporation assuming the liability, it is competent for the defendant to allege and prove facts tending to explain a latent ambiguity in the contract between the two associations. Kentucky Citizens Bldg. & Loan Ass'n v. Lawrence, &c. .... 88
2. Same—Mistake in Reducing Contract to Writing.—Where the true intention of the parties to a contract is not expressed by a writing to which the contract is reduced, it is competent for the parties to allege and prove that the real contract between the parties by the mistake of the draughtsman had not been reduced to writing, and it is immaterial whether this mistake was due

## Contracts.

## CONTRACTS—Continued.

- to a misapprehension as to the effect of the words used or a mistake in another respect. *Idem.* ..... 88
3. Public Policy—Agreement for Attorney's Fee.—A stipulation in a mortgage to a trustee to secure bondholders for a reasonable attorney's fee to the trustee and compensation to the trustee, if the lien should be enforced, is against public policy and void. *Kentucky Trust Co., Trustee, v. Third National Bank of Louisville, &c.* ..... 232
  4. Mutuality.—A contract to employ plaintiff so long as defendant was engaged in the saw-mill business on the Ohio river for a fixed sum per diem in consideration of plaintiff's release of damages incurred in defendant's employment, is not void for want of mutuality. *Yellow Poplar Lumber Co. v. Rule.* ..... 455
  5. Same—Indefinite Time.—Nor is such a contract subject to termination at the will of the defendant for indefiniteness. *Idem.* ..... 455
  6. Statute of Frauds.—Such a contract being possible of performance within a year is not within the statute of frauds. *Idem.* ..... 455
  7. Against Public Policy—Unlicensed Stallion.—The owner of an unlicensed stallion may not maintain an action for the service of such stallion. *Smith v. Robertson, &c.* ..... 472
  8. Same—Forfeitures—Waiver.—The right reserved by appellee, one of the parties to a contract, to retain as a forfeiture a reserved percentage of the contract price for services to be rendered in cutting and hauling timber to its mill will be treated as waived by its acceptance of appellant's services under the contract after its breach and by its urging appellants to go on with their compliance with the contract. *Howard, &c., v. The Thompson Lumber Co.* ..... 566
  9. Sales of Personal Property—Contract by Correspondence.—To an inquiry by letter by the appellee addressed to the appellant for the lowest price of ten car loads of Mason jars complete with caps, with terms, the appellant replied, fixing the price for immediate acceptance and shipment not later than May 15th. To this letter the appellee responded by telegram, accepting the offer and referring to specifications mailed. Held, the correspondence made a complete contract, and appellant's refusal to furnish the articles rendered it liable for damages. *Fairmount Glass Works v. Crunden-Martin Woodenware Co.* ..... 659
  10. Contribution to Bridge Rental—Damages for Breach.—Appellee and other railroad companies entered into an agreement with appellant to contribute in proportion to the business done, a rental which would cover appellant's fixed charges and create a sinking fund to pay appellant's bonded indebtedness, with the further provision that the rental should be reduced in propor-

## Contracts.

## CONTRACTS—Continued.

- tion to the increase of the sinking fund and the contribution which other roads might make to the aggregate rental. The other participating roads received rebates on rentals paid but the appellee did not. In an action against the appellant to recover overcharges on rentals, it is held that plaintiff is entitled to a judgment for an amount of its overcharges estimated on the traffic basis; and that it was no defense to the action that the traffic reports which the appellee covenanted to make were made by its connecting lines and not by appellee itself. *Louisville Bridge Co. v. Louisville & Nashville R. R. Co.*.....674
11. Same.—Plaintiff, in an action for breach of contract, is not precluded from recovery by failing to comply with a stipulation inserted for its own benefit and in which the other contracting parties have no interest. *Idem.* .....674
12. Rescission—Breach of Warranty.—A written contract is presumed to embrace the entire agreement between the parties and in the absence of proof of fraud committed by one of the parties before or at the time of the execution of the contract the other party is not entitled either to (1) a rescission on that ground, or (2) to damages for breach of warranty. *Worland v. Secrest* .....711
13. Venue—Action Under Contract for Timber.—An action to recover the contract price for timber cut and hauled, may be brought in any county where the defendant is served with process, and the court may decree a sale of such timber as is found in that county. *Tilford, &c., v. Dotson*.....755
14. Same.—In such an action the court, to enforce the plaintiff's lien, may decree a sale of identified trees embraced by said contract standing in counties other than that in which the action is brought—such trees being personalty and not realty. *Idem.*...755
15. Executory Contract—Option—Forfeiture.—An agreement entered into by two parties whereby one binds himself to purchase lands from the other at an agreed price, of which 5 per cent. was to be paid on a certain date and the residue of such payment on or before another fixed date, with the stipulation that the 5 per cent. was to be forfeited if the purchaser failed to pay the residue of the cash payment on time, is an executory contract for the sale of land and the 5 per cent. paid is not a mere price for an option to buy nor is it to be deemed liquidated damages for breach of the contract. *Allison, &c., v. Cocke's Ex'r, &c.*762
16. Forfeiture—Relief.—A court of equity will relieve against a forfeiture incurred in such a case, leaving the vendor to set off against the plaintiff's claim his actual damages sustained by the vendee's failure to comply with his agreement. *Idem.* .....762

## Contributory Negligence—Corporations.

## CONTRIBUTORY NEGLIGENCE—

See Negligence, 5.

## CONVICTION—

A conviction under section 1932, Kentucky Statutes, providing for rewards for the arrest and conviction of felons, means a final conviction, and can not be held to have been had while an appeal is pending to reverse the judgment of conviction. *Stone, Auditor, v. Wickliffe* .....252

## CORPORATIONS—

1. Power to Mortgage.—A power to mortgage corporate property is necessarily implied in the power to contract debts. *Bell & Coggeshall Co., The, &c., v. Kentucky Glass Works Co., &c.* 7
2. Same—Mortgage by Executive Officers.—A mortgage of corporate property by the executive officers to whom the general management of corporate affairs was intrusted by the articles of association, and exercised for a long period by general acquiescence, can not be held invalid on account of the failure of the corporation to formally authorize it. *Idem.* ..... 7
3. Same—Indebtedness in Excess of Charter Limit.—As against other corporate creditors a mortgagee of corporate property will not be permitted to enforce his mortgage for an amount in excess of that named in the articles of association as the limit of corporate indebtedness. *Idem.* ..... 7
4. Power to Guarantee Dividends.—In the absence of an express statute a corporation organized under chapter 56 of the General Statutes of this State, has no power to bind itself by contract with its stockholders to guarantee them dividends not in fact earned. It seems that there is no such statute in this State. *Kentucky Citizens' Bldg. & Loan Ass'n v. Lawrence, &c.*..... 88
5. Same.—A corporation having no power to guarantee to its stockholders dividends not in fact earned, an assignment by it to another corporation and the guarantee by the latter to carry out the contracts of the former does not carry with it any obligation to pay dividends not earned, and the liability of the guaranteeing corporation is merely for a distribution of assets. *Idem.* ..... 88
6. Report for Franchise Tax.—A private trading corporation not "having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons or performing any public service" is not required to make a report to the Auditor as a basis for the ascertainment of and tax upon its franchise. *The Louisville Tobacco Warehouse Co. v. Com.* .....165
7. Organized for Charitable Purposes.—Section 883 of the Ken-

## Corporations—County Levy.

## CORPORATIONS—Continued.

tucky Statutes, which excepts corporations organized for charitable purposes from the general provisions applicable to corporations, is not limited to corporations organized under the act of which that section is a portion, but is applicable alike to all corporations of such character, whether they were organized previously to the passage of the law or subsequently thereto. *Johnson v. Mason Lodge No. 33, I. O. O. F.* .....837

8. Estoppel by Dealing with a Corporation.—A person who borrows money from a corporation and executes his note therefor is estopped to deny the legality of the transaction when sued on the note. *Idem.* .....837

## COUNTIES—

\*See Mandamus, 3.

## COUNTY CLAIMS—

Order of Payment.—It is the duty of the county treasurer to pay in the order of their presentation warrants issued for county claims for the current year out of the funds in his hands arising from the levy of such year in preference to warrants issued for claims arising in former years. *Cooper v. Wait, Treasurer.*..628

## COUNTY COURT—

See also Fiscal Court.

1. How Composed for Fiscal Purposes.—As section 142 of the Constitution was not carried into effect until the first Monday in January, 1895, the county judge and the magistrates of the county constituting the fiscal court as it was organized prior to the adoption of the new Constitution, were authorized to fix a county levy for the year 1894. *Pulaski County v. Watson, Sheriff.* .....500
2. Special Terms.—There is nothing in the statute precluding the fiscal court from making a county levy in other than the regular terms thereof. *Idem.* .....500
3. Same.—Levy Prior to Complete Assessment.—A county levy laid at a special term in September is not invalid in that it is laid prior to the completion of the assessment. *Idem.*.....500

## COUNTY LEVY—

See also Bonds, 4; County Court, 2 and 3.

Validity of.—A levy made by the county court directing the sheriff "to collect twenty-five cents on each one hundred dollars of the taxable property reported by the assessor for said year, and one dollar on each tithable reported by the assessor for said year," is sufficiently definite as the basis of a levy for the purpose intended. *Pulaski County v. Watson, Sheriff* .....500

## Criminal Law.

## CRIMINAL LAW—

See Perjury; Instructions, 5, 6, 7; Homicide, 1, 2; Insurance, 9; Spirituous Liquor.

1. Sale of Spirituous Liquor.—A petition for an election under section 2554 of the Kentucky Statutes and an order for an election to be held pursuant to said petition, directing the election to take the sense "of the legal qualified voters in said district as to whether or not spirituous, vinous or malt liquors, or brandies, or a mixture thereof, of the manufacturer's own material, shall be sold, bartered or loaned in quantities *as low as one quart in said district*," are not responsive to either state of case authorized by that section of the statutes; and a prohibition law being in force in Owsley county prior to such election, its force was not impaired by such an election. *Reynolds v. Com.*..... 37
2. Same—Indictment.—The election being void, it was not necessary for the indictment to state in what part of the county the offense took place, the prohibition law in force being applicable to the entire county. *Idem.* ..... 37
3. Same.—It was not a valid objection to the indictment that it alleged a sale of less than five gallons in violation of the special statute prohibiting the sale in quantities of less than twenty gallons; for while the local statute prohibited a sale in quantities of less than twenty gallons, the provisions of the general local option law have been substituted for those of the local act as to the amount necessary to be sold to constitute an offense, as well as to the penalty. *Idem.* ..... 37
4. Same.—It was not necessary to allege that the sales were made without license. The local option law being operative in the county, no license could be legally granted. *Idem.*..... 37
5. Exclusion of Witnesses.—It is within the sound discretion of the trial court to permit a witness to remain in the court room, although the witnesses have been excluded from the court room on the motion of defendant. *Baker v. Com.* ..... 212
6. Evidence.—It is probably competent on a trial for homicide to show that the accused had been indicted at the instance of the deceased, as tending to show motive for the killing, but it is error to admit such evidence without instructing the jury that such evidence is competent to show motive only. *Idem.*..... 212
7. It was error to permit the Commonwealth's Attorney to ask the defendant on cross-examination if he had not been indicted for offenses wholly unconnected with the crime for which he was being tried, and not tending to show motive. *Idem.*.... 212
8. It is not competent to ask a defendant questions whose only possible object is to excite in the minds of the jury a suspicion

Criminal Law.

Continued.

- guilty of other offenses than the one for which  
*Idem.* .....212
- to cross-examine a defendant by asking him with  
 transactions tending to disgrace him, but the period  
 which the inquiry is made would have to bear some  
 able relation to the time at which the testimony is given,  
 a period of fifteen years is too remote. *Idem.*.....212
- Dying Declarations.—It is the duty of the trial court before ad-  
 mitting statements as dying declarations to satisfy himself that  
 such declarations were made when the deceased was under a  
 solemn sense of impending dissolution, and in determining this  
 preliminary question the intendments of law are in favor of the  
 finding of the trial court, and this court will give some weight  
 to the finding of the trial judge upon this question and will  
 defer to his conclusion of fact where the testimony is con-  
 tradicted. *Idem.* .....212
11. It is inadmissible to permit witnesses to state that the deceased  
 said as a part of his dying declaration, "I want all you people  
 to swear the truth about this." *Idem.* .....212
12. Right to Waive Keeping Jurors Together.—The right to have  
 accepted jurors kept together in charge of the sheriff in a  
 felony case is a statutory and not a constitutional right, and  
 may be waived by the defendant. *Wade v. Com.*.....321
13. Instructions—Self-defense.—An instruction on the subject of self-  
 defense in a homicide case that "if they shall further believe  
 from the evidence herein that the accused, at the time he shot  
 and killed said Pepler, had reasonable grounds to believe, and  
 did believe, from all the circumstances, as they appeared to  
 him, that the said Pepler was then and there about to take his  
 life, or inflict upon his person some great bodily harm, he had a  
 right to use any means at his command that were to him ap-  
 parently necessary," is not erroneous to the prejudice of defend-  
 ant by reason of the use of the words "from all the circum-  
 stances as they appeared to him." *Idem.* .....321
14. Evidence.—It was competent for the Commonwealth to show as  
 bearing on the question of malice that the deceased and defend-  
 ant had a quarrel over some whisky a few hours before the  
 killing. *Idem.* .....321
15. Verdict.—A verdict, "Wee, the jury, agree and find the de-  
 fendant guilty as charged in the indite, and sess his find at \$100.  
 Isaac Clouse," is sufficient to base a judgment on. *Mitchell v.*  
*Com.* .....602
- 16.—Indictment—County.—An indictment will not be invalid by a

## Criminal Law—Damages.

## CRIMINAL LAW—Continued.

- misnomer of the county in the caption, the county being properly set out in the body of the indictment. *Idem.* .....602
17. Larceny—Instruction Not Prejudicial.—On the trial of a defendant on the charge of larceny, where the defense is that the defendant found the articles alleged to have been stolen, an instruction in the usual form that to constitute the guilt the defendant must be shown to have taken and carried away with felonious intent the stolen articles, is not prejudicial, although it ignore the defense set up. *Hall v. Com.* .....894
18. Horse-stealing—Instructions.—Upon the trial under an indictment for horse-stealing it is error to instruct the jury to convict if the defendant received the horse knowing it to have been stolen. *Gilbert v. Com.* .....919

## DAMAGES—

See Bonds, 1, 2; Contracts, 10.

1. Excessive.—A verdict for \$17,500 compensatory damages to a woman thirty-five years old, who seems to be in possession of all her faculties and not especially disfigured, and whose capacity for attending to her household duties is to some extent impaired but not destroyed, is excessive, although it appears that the injuries complained of resulted in confining her to her bed for two months, and who walked on crutches for some time, and suffered much from hysteria and headache, and injuring her head, from which a possibility arises of danger of her mind being affected. *Louisville & Nashville R. R. Co. v. Creighton, &c.* ..... 42
2. Same.—A verdict for \$10,500 damages for the loss of life of an infant between three and four years old, is excessive. *Idem.*... 42
3. Electric Car Lines on Highway.—The owner of a lot abutting on a highway outside of a municipality is entitled to recover damages from an electric railroad company, which has constructed a track in front of his lot tending to obstruct the free access to same. *Ashland & Catlettsburg St. Ry. Co. v. Faulkner.*....332
4. Same—Appropriation of Plaintiff's Land.—The question of whether the defendant actually appropriated any part of plaintiff's land for its track and the resulting damage, if it did so, was properly submitted to the jury, the evidence being conflicting. *Idem.* .....332
5. Same—Excessive Damages.—A verdict for \$665 in such a case is held by the court to be excessive in view of the evidence that the measure of obstruction and consequential damage is inconsiderable. *Idem.* .....332
6. Separation of Punitive from Compensatory Damages.—As the jury



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 Damages—Descent and Distribution.
 

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## DAMAGES—Continued.

- has separated its findings so as to fix \$13,500 as the compensatory, and \$5,000 as the punitive damages, this court will disregard an erroneous instruction authorizing punitive damages, will reverse the judgment giving punitive damages and affirm that for compensatory damages. *Chesapeake & Ohio Ry. Co. v. Judd's Admr.* ..... 364
7. Measure of.—In an action for damages for negligence resulting in death, the measure of damages is the power of the decedent to earn money, and no further element can be considered except in cases of gross and wilful negligence. *Louisville & Nashville R. R. Co. v. Taaffe's Admr.* ..... 535
8. Measure of Damages—Breach of Building Contract.—The measure of damages for a breach of a building contract where there has been substantial compliance, is the difference between the value of the building constructed as it is and what it would have been worth if it had been constructed according to contract. *Taulbee v. Moore* ..... 749

## DEEDS—

- Construction.—A conveyance to A "and his heirs after him, to have and to hold unto the party of the second part, his heirs and assigns forever" created a fee simple estate, the word "heirs" being a word of limitation and not of purchase. *Lane v. Lane* ..... 530

## DESCENT AND DISTRIBUTION—

1. Purchaser of Undivided Interest.—A purchaser by executory contract of land inherited by the vendor jointly with others, is under no legal obligation to redeem the land from the ancestor's debt, although he may have sufficient money in his hands going to the vendee to make such redemption; because to do so would involve a redemption of the interest jointly owned. *King, &c., v. Middlesborough Town Lands Co., &c.* ..... 73
2. Lands of an infant dying in infancy go by descent to the infant's parents equally, and on the death of such parent such lands pass to his, or her, children as if he, or she, acquired same by purchase. *Idem.* ..... 73
3. Half Blood.—Collaterals of the half blood take one-half as much as those of the full blood. *King, &c., v. Middlesborough Town Lands Co., &c.* ..... 73
4. Infant's Exempt Property.—Upon the death of an infant whose estate consists of the proceeds of the sale of personal property and rent of the homestead which had been set apart to the joint support of the deceased infant and her brother, also an infant,

## Descent and Distribution—Elections.

## DESCENT AND DISTRIBUTION—Continued.

the said proceeds and rent go to the surviving brother, and not to the administrator of the deceased infant. *Willson v. Parson's Admr.* .....378

## DEVISES—

**Construction—"Children," Designating Purchasers.**—Under the will of John R. Hill, which provided that his realty should be rented for five years to pay his debts, and after that period a certain portion of same should be given to his daughter Eva, to vest in her to her separate use, but in the event she should marry and die without children and leave a husband surviving her, then remainder over to the husband for and during his natural life with remainder to the testator's son Bradley, if living, or, if dead, to his children, if any, or if none, then to the grandson of the testator, Joe Smith; or if the said daughter should die leaving children, then the land should go to the said children, the child of said Eva surviving her and living beyond the five-year renting period provided for in the will, took as purchasers under the will of his grandfather; and upon his death his brothers and sisters of the half blood inherited the land to the exclusion (first) of the testator's son Bradley, and (second) of the devisees of his daughter Eva. *Cooksey, &c., v. Hill, &c.*...297

## DYING DECLARATIONS—

See Criminal Law, 10.

## EJECTMENT—

**Patents—Definiteness Required.**—Where the exterior lines of a patent boundary are sufficiently definite to locate the land, the patent is not invalidated by excluding unidentified tracts within the boundary held under prior grants. *Breathitt Coal, Iron & Lumber Co., The, v. Strong, &c.* .....699

## ELECTIONS—

1. **Contest—Notice.**—A notice of contest in the absence of a motion to make same more specific, can not be held to be insufficient in failing to state that the contestant was eligible to the office he was contesting. *Tunks v. Vincent* .....828
2. **Same.**—Nor can such notice be held to be insufficient in failing to specify the names of the voters whose votes were challenged as illegal, or those who were charged to have been permitted to vote improperly. *Idem.* .....828
3. **Same—Officer's Return in Blank.**—The court will not undertake to reject a precinct because the officer's return is blank as to the names of the candidates receiving the votes at that pre-

## Elections—Evidence.

## ELECTIONS—Continued.

- elect for the office in contest where the return shows the number of votes cast for each party and there was but one candidate for each party for that office at that election. *Idem.*.....828
4. Same—Effect of Decision of the Contest Board on Illegal Votes.—The decision of the contest board as to the legality or illegality of the vote cast is not final, but is subject to revision by the courts. *Idem.* .....828
5. Same.—Decision of the Lower Court on Questions of Fact.—The decision of the lower court upon the legality or illegality of a vote as depending upon a question of fact will not be disturbed without good reason, and where it appears that a vote is illegal it will be rejected whether the ballot was deposited in the ballot box or not. *Idem.* .....828
6. Evidence.—Testimony that a voter was a Republican is competent as a circumstance bearing upon the question as to how he voted. *Idem.* .....828
7. Same.—A voter is a competent witness to prove how he voted, and he may be compelled to testify as to how he voted unless he decline upon the ground that such testimony would incriminate him. *Idem.* .....828
8. Same.—The statements of a voter as to how he voted are incompetent, being mere hearsay. *Idem.* .....828

## EQUITY—

See Rescission, 1, 2, 3, 4 and 5.

Representations of Anticipated Facts.—A fraudulent misrepresentation to warrant relief from a contract must be of an existing and not of an anticipated fact; and the answer in this case, fairly construed, sets out promises for the future. *Ryan v. Middlesborough Town Lands Co.* .....181

## ESTOPPEL—

See Insurance, 5.

To Deny Corporate Existence.—A person who executes a covenant to a corporation can not deny generally the existence of such corporation in bar of the action. Such a pleading, if good at all, is in abatement and not in bar. *Wood, &c., v. Friendship Lodge, &c.* .....424

## EVIDENCE—

See Criminal Law, 6, 7, 8, 9, 10, 11, 12, 14; see also Perjury; Adverse Possession, 2; Elections, 6, 7, 8; Instructions, 2, 3; Contracts, 1, 2.

1. Evidence—Transaction with Decedent.—In an action on a promise

## Evidence.

## EVIDENCE—Continued.

- sory note alleged to have been executed by mark by a person who is dead at the time of the trial the plaintiff is not a competent witness to prove either (1) the execution of the writing by the decedent or (2) the handwriting of the attesting witness, or (3) the execution of an executory contract, out of which the note was claimed to have arisen. *Cunningham's Admr., &c., v. Speagle* .....278
2. Same.—In such an action it is error to permit plaintiff's attorney to testify as to a credit on a note, and especially to detail the statements made to him by the plaintiff with reference to such payments. *Idem.* .....278
3. Preponderance of.—The court in this case examines the evidence and finds that the chancellor's finding of facts is not palpably against the weight of the evidence, either as to first, the rents, and second, the waste. The fact that the renting by the appellee was at public out-cry to the highest and best bidder, is not conclusive that the rent thus obtained, was a fair and reasonable rent. *Turner, &c., v. Johnson* .....460
4. Number of Decedent's Family.—In an action to recover damages for an injury resulting in the death of intestate, it was error to permit evidence to go to the jury of the number of the decedent's family; but such evidence can not in this case be held to be prejudicial. *Louisville & Nashville R. R. Co. v. Taaffe's Admr.* .....535
5. Probable Cause.—In an action for malicious prosecution the jury should be instructed that the plaintiff can not recover unless the prosecution was both malicious and without probable cause; and in determining the latter issue, the court should permit the defendant to prove all statements made to its agents before the warrant was sworn out tending to connect the appellee with the offense. *Ahrens & Ott Mfg. Co. v. Hoeher* .....692
6. Same—Advice of Counsel.—Advice of counsel only constitutes probable cause when reasonable diligence has been used to ascertain the facts upon which the advice of counsel was sought. *Idem.* .....692
7. Husband and Wife—Transactions with Decedent.—In an action for the benefit of a married woman to declare a trust in certain personalty against an estate in the hands of executors, as the action might have been brought by the wife alone, her husband is a competent witness in her behalf, but as to transactions with a person who was dead at the time of the proposed testimony, he was incompetent to testify as to any facts as to which the wife herself was incompetent. *Bright's Exrs. v. Swinebroad, &c.* .....736

## Evidence—Guaranty.

## EVIDENCE—Continued.

8. Same—Trustee for Wife.—In such an action the trustee for the wife is competent to testify as to transactions with the testator—he not being in any sense an agent for the wife. *Idem*....736
9. Same—Breach of Building Contract—Conclusion of Witness.—Where the building contract sued on was in parol it is not error to permit the plaintiff to state generally that the house was built according to the contract. *Taulbee v. Moore*.....749
10. Evidence in Chief.—The order in which evidence is to be introduced is within the sound discretion of the trial court; and this court will not reverse for a refusal to permit appellant to introduce additional evidence in chief after the appellee had closed his testimony. *Idem*. ....749
11. Evidence of Defendants Jointly Indicted.—Defendants jointly indicted with the appellant and to whom a separate trial had been awarded, were competent witnesses against the appellant. *Gilbert v. Com.* .....919

## FERRIES—

Right a Mere Privilege.—A ferry right granted under the statutes is a mere privilege which the owner has no right to encumber, so as to interfere with the performance of his duties to the public; hence, a contract to ferry one and his family is not binding on the successor to the ferry owner after the expiration of the period for which the franchise was granted. *Potts, &c., v. Park* .....202

## FISCAL COURT—

Fiscal Court of Jefferson County—How Composed.—The fiscal court of Jefferson county is composed of the county judge and the eight justices of the peace of the county, the act of April 6, 1888, providing for commissioners having been repealed—if not by section 144 of the Constitution, certainly by the act of October 17, 1892, enacted to carry that section into effect. *Joyes v. Jefferson County Fiscal Court, &c.* .....615

## FRAUDS, STATUTE OF—

See Contracts, 6.

## GUARANTY—

Continuing, Terminated by Death of Guarantor. A continuing guaranty so far as it remains executory is terminated by the death of the guarantor, although the guarantee may be ignorant of such death. *Aitken Son & Co. v. Lang's Admr.* .....652

## Homestead—Homicide.

## HOMESTEAD—

1. Homestead.—A party entitled to a homestead in money out of realty not divisible, is entitled to the entire amount of one thousand dollars, and the assignee has no right to deduct from that amount any sum due him from the assignor for rent of the assigned property. *McNamara, Assg., &c., v. Schwaniger* .... 1
2. Homestead in Lands Descended.—A *bona fide* housekeeper with a family who acquires land by descent is entitled within a reasonable time after the death of his ancestor to build a residence and move on to the land, and his right to a homestead will be superior to the claim of an antecedent creditor who had an execution levied on the land before the erection of the improvements. *Spratt v. Allen* .....274
3. Of Husband in Wife's Land.—A husband is not entitled to a homestead in his wife's land prior to the latter's death; and the fact that he occupied same for that purpose prior to the acquisition of lands by descent will not preclude him from claiming a homestead in land so acquired. *Idem.* .....274
4. Antecedent Liability.—A covenant of general warranty created a liability within the meaning of section 1702, Kentucky Statutes, and where the covenant is executed prior to the acquisition of the homestead the latter is subject to the warranty claim, though the eviction occurred after the homestead had been acquired. *Benge's Admr. v. Bowling*.....575
5. Same—Family.—A daughter who is a married woman of full age, between whom and her husband there has been neither an actual nor a legal severance of the marriage bond, and for whose support the husband is still bound both legally and morally to provide, does not constitute a family within the exemption statute; nor does a granddaughter temporarily visiting in the debtor's family. *Louisville Banking Co. v. Anderson, &c.* .....744

## HOMICIDE—

1. By Exposing Infant.—It is felony to wilfully abandon a helpless infant on a cold, raw night and leave it to die of exposure, whatever may have been the purpose in so leaving it. *Gibson v. Com.* .....360
2. Same—Instructions.—In such a case the court correctly instructed the jury that "if they believed from the evidence beyond a reasonable doubt, that the defendant, without malice, but unlawfully, wilfully and feloniously cast her child upon an open lot without sufficient shelter or clothing to protect it from the inclemency of the weather, but that said act was done with the hope that it would be rescued or taken care of by some other person before it should freeze to death, but by reason of said

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Homicide—Instructions.

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## HOMICIDE—Continued.

exposure it did freeze; then, in that event, the defendant was guilty of voluntary manslaughter. *Idem.* .....360

## HUSBAND AND WIFE—

(See Evidence, 5.)

## INDICTMENTS—

(See Criminal Law, 2, 3, 4, 16, 18.)

## INSTRUCTIONS—

(See Criminal Law, 13, 14, 17, 18; Homicide, 2; Negligence, 3, 5; Malicious Prosecution, 1.)

1. Calling Attention to Particular Facts.—The court properly refused instructions offered by the defendant calling special attention to particular points in the evidence. *Chesapeake & Ohio Ry. Co. v. Judd's Admr.* .....364
2. Peremptory Instructions—Conflicting Evidence.—The proof as to the circumstances and conditions under which the decedent lost his life being conflicting it was proper for the court to refuse the peremptory instruction asked for by defendant, and in refusing to enter judgment for the defendant notwithstanding the verdict. *Louisville & Nashville R. R. Co. v. Taafe's Admr.* ..535
3. Upon Points Covered by the Court.—The appellant can not complain of the failure of the court to give instructions asked by it when the principles embodied in those instructions were covered by those given by the court. *Idem.* .....535
4. Mutual Duties of Parties With Reference to Use of Railroad Track Within a Town.—It is the duty of those in charge of a railroad train when approaching the station to use reasonable and ordinary care to discover any obstruction upon the track and it was their duty also to give timely notice of its approach to the station. They had a right, however, to presume that any person standing or walking upon the track of a railroad would in due time remove himself out of danger of injury, and until they discover that such person even a trespasser was oblivious of the danger, they were not required to stop or check the speed of the train. It was the duty of the decedent if he had notice of the approach of the train to the station to exercise reasonable care to ascertain the proximity of the train to the station and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching; and it was his duty if he heard the train whistle, indicating its approach to the station, to be on the look-out for the same and to keep himself out of danger. These principles should be embodied in the instructions given to the jury in an action to recover

## Instructions—Insurance.

## INSTRUCTIONS—Continued.

- damages for negligence resulting in the death of the plaintiff's decedent. *Idem.* .....535
5. Larceny.—On the trial of an indictment for larceny where two former convictions are also alleged the defendant is not entitled to a separate finding on the guilt or innocence of the main charge but the jury should be required to find, under the appropriate instructions, the fact of former convictions and fix the increased penalty. *Hall v. Com.* .....894
6. Criminal Law—Larceny.—On the trial of a defendant on the charge of larceny, where the defense is that the defendant found the articles alleged to have been stolen, an instruction in the usual form that to constitute guilt the defendant must be shown to have taken and carried away with felonious intent the stolen articles is not prejudicial, although it ignore the defense set up. *Idem.* .....894
7. Instructions as to Accomplices.—The court should have instructed the jury that appellant could not be convicted by the testimony of Keefe and See, since both of them were jointly indicted with him. *Gilbert v. Com.* .....919

## INSURANCE—

See Venue and Insurance Commissioner; Assignment, 5.

1. Waiver of Forfeiture.—A mutual insurance company by making assessments upon a member of the company after notice to its solicitor that additional insurance had been taken out on the insured property, waived the forfeiture prescribed by its policy as a penalty for additional insurance. *Rogers v. Farmers' Mutual Aid Assn.* .....371
2. Same—Waiver of Condition of Absolute Ownership.—Where, at the time of the obtainment of a policy of insurance, the agent of the insurance company knew that the applicant held the title in trust for himself and others jointly, his representation of absolute ownership will not avoid the policy. *Mutual Fire Ins. Co. v. Hammond.* .....386
3. Same—Action in Name of Insured.—In such a case the insured may maintain an action in his own name without joining as plaintiffs those jointly interested. *Idem.* .....386
4. Life Insurance—Non-Forfeiture Clause—"Full Amount Insured by this Policy."—Where an insurance policy contains a non-forfeiture clause which provides that in the event the insured fails to pay his annual premium the reserve value of the policy and the dividend additions shall be applied as a single premium to carry the policy "for the full amount insured" for a term estimated at the company's published rates and in force at the



## Insurance—Interest.

## INSURANCE—Continued.

- date of the issual of the policy, the language "full amount insured" means the face of the policy, although the contract contained the stipulation that during the first ten years the uncollected dividends should buy additional insurance. *Mutual Benefit Life Ins. Co. of Newark, N. J., The, v. Dunn.* .....591
5. Estoppel.—In the absence of a plea of estoppel the plaintiff will not be concluded by a different construction of the contract made by the insurance company and sent to the insured in his lifetime of which she had no knowledge. *Idem.* .....591
6. Soliciting Agent.—One who solicits insurance by an agreement between himself and an agent of the company will be treated as an agent of the company, and his knowledge of the facts pertaining to the insurance will be deemed the knowledge of the company. *London & Lancashire Ins. Co. v. Gertelsen* .....814
7. Waiver.—An insurance company which issues a policy with knowledge that conditions inserted in the policy for its benefit are not to be complied with, will be held to have waived same. *Idem.* .....814
8. Agreement to Furnish Watchman.—An agreement to keep a watchman on duty at all hours of the night is not an absolute warranty; and the court properly limited its instruction to find for the defendant on account of a failure to do so by inserting the condition that "by reason of such failure the loss occurred." *Idem.* .....814
9. Conspiracy to Fix Rates.—It is not an indictable offense to conspire to fix insurance rates, either by virtue of section 3915 of the Kentucky Statutes against conspiracies to regulate the prices of "merchandise, manufactured articles or property of any kind;" or by the common law as it existed prior to the fourth year of King James I. *Aetna Ins. Co. v. Com.* .....864
10. Insurance Policies—Insurable Interest.—The assignment of an insurance policy as indemnity to a surety is valid only to the extent such surety may pay the assignor's debt. *Barbour's Admr. v. Larue's Assig., &c.* .....546

## INSURANCE COMMISSIONER—

Service of Process on Insurance Commissioner.—In an action upon an insurance policy this court will indulge the presumption that the company complied with the law, and will uphold the validity of a judgment upon service of summons upon the insurance commissioner. *Mutual Fire Ins. Co. v. Hammond* .....386

## INTEREST—

Estimate of.—The terms of a contract fixing the liability of appellant to deliver one hundred trees every thirty days on the

## Interest—Landlord and Tenant.

## INTEREST—Continued.

banks of floating water, whether there was sufficient water to float them to the railroad or not, fixes the time for the delivery of the timber and it was proper for the lower court to make the payments bear interest upon that basis. *Tilford, &c., v. Dotson* .....755

## JUDGMENTS—

(See Sales; Mistake, 2.)

1. Records—Verity of.—A motion to set aside a judgment because it was rendered on October 1st, because no court was then in session will be overruled, the record showing that the judgment was entered on the first day of the October term. *Monarch v. Brey* ..... 688
2. Treasury—General Expenditure Fund.—A judgment against the Commonwealth is payable out of the general expenditure fund where the military fund for a given year, out of which the claim was originally payable, has been exhausted. *Com v. Haly, &c.* .....716

## JURY—

1. Panel.—Under section 2243, Kentucky Statutes, providing for the creation of the panel of petit jurors, the panel consists of twenty-four and not thirty jurors. *Stone, Auditor, v. Saunders* .....904
2. Same—Certificate of the Court to Jury Lists Conclusive.—Jurors who are sworn to serve more than one day are entitled to pay under the new statute, and in the absence of anything in the record to rebut the presumption, the amount ordered to be paid by the court to the jurors will be taken as correct. *Idem.* ...904

## LANDLORD AND TENANT—

1. Liability of Assignee of Tenant.—An assignee of a lease who takes his assignment with the landlord's consent becomes liable for the rent subsequently accruing with a lien for its enforcement for one year's rent, and this liability can not be put off by him by an assignment of the remainder of the term. *Meyer Bros' assignee v. Gaertner* .....481
2. Same—Liability for Rent of Purchaser of Leasehold.—The holder of a lease for ten years sublet the premises for eight years with an option for the other two, and then assigned his leasehold to his wife with the fraudulent purpose of defeating his creditors. A creditor of the lessee caused an execution to be levied on the lessee's interest and the sub-tenant became the purchaser. The lessee caused a distress warrant to be issued against the sub-

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Landlord and Tenant—Malicious Prosecution.

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## LANDLORD AND TENANT—Continued.

tenant for rent which the latter enjoined. It is held: (1) That the sub-tenant could buy his landlord's leasehold at execution sale, and did not thereby become liable to him for rent; (2) the fraudulent assignment of the leasehold to the lessee's wife did not prevent his creditor from levying on and selling his interest under the execution; nor (3) did the contract between the lessee and the sub-tenant prevent the former's interest from being sold under execution. *Smith v. Scanlan* .....572

## LIMITATION—

1. Sureties.—Where a note payable five years from date with interest payable at stated intervals contained the stipulation that should as much as two installments of interest at any time be due and unpaid, then in that event the whole should be and become due, a cause of action accrued when two installments of interest had fallen due and limitation then began to run in favor of the surety of said note and the cause of action was barred in seven years from that time. *Ryan v. Caldwell* ...543
2. Same—In Favor of Commonwealth.—Limitation does not begin to run in favor of the Commonwealth until permission has been granted to maintain a suit against it. *Com. v. Haly, &c.* ....716
3. Same—Death of Person Injured.—A cause of action for suffering accruing to one for personal injury survives to his personal representative, and limitation does not cease to run upon the death of the person injured. If no personal representative qualified until the lapse of a year from the injury, the cause of action becomes barred. If, however, a personal representative qualified before the bar is complete, the statutory period of limitation is extended one year from the qualification. *Louisville & Nashville R. R. Co. v. Brantley's Admr.* .....847

## MALICIOUS PROSECUTION—

(See also Evidence, 3 and 4.)

1. Instruction on Malice.—In an action for malicious prosecution it is error to define malice as "the intentional doing of a wrongful act to the injury of another, without justification or legal excuse therefor." In such an action there must be malice in fact or the motive must be improper or wrongful. *Ahrens & Ott Mfg. Co. v. Hoeher* .....692
2. Probable Cause.—The court may, in such an action, properly tell the jury that they may infer malice from a want of probable cause. *Ahrens & Ott Mfg. Co. v. Hoeher* .....692
3. Same.—What is probable cause is a question of law for the court,

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 Malicious Prosecution—Mistake.
 

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## MALICIOUS PROSECUTION—Continued.

- but the facts from which the question of probable cause is determined are for the jury. *Idem.* ..... 692
4. Same.—Probable cause exists where the person instituting the prosecution believes, and has such grounds as would induce a man of ordinary prudence to believe, that the person against whom the prosecution is instituted has committed the offense. *Idem.* ..... 692

## MANDAMUS—

1. Rewards—Sufficiency of Petition.—A petition for a mandamus against the Auditor to require him to issue his warrant for a reward offered by the Governor for the arrest and conviction of a felon, which alleges that the plaintiff ascertained that the defendant was guilty, swore out a warrant for his arrest, delivered it to the sheriff and assisted in arresting the defendant and delivering him to the jailer, can not be held insufficient merely because the jailer's receipt filed with the petition recites that the defendant was delivered to him by the sheriff, "and W. A. Wickliffe was with him at the time." Such a recital is not a contradiction of the averment. *Stone, Auditor, v. Wickliffe.* 252
2. Affidavit to Remove Justice of Peace—Mandamus to Control Discretion.—An affidavit that a justice of the peace will not afford a litigant a fair and impartial trial, without stating the facts upon which such an opinion is based, is insufficient, and the ruling of the justice that such affidavit was insufficient, being within discretion, will not be controlled by mandamus. *Galbraith v. Williams, J. P.* ..... 431
3. Counties—Duty as to Public Ways Within a City.—Where a county, under the act of March 17, 1896, acquires a turnpike lying partly within a municipality, so much of the road as is so situated comes immediately within the control of the municipality, and it is the latter's duty to maintain it. *Board of Council of Danville v. Fiscal Court of Boyle County.* ..... 608

## MISPRISION—

(See Practice, 3.)

## MISTAKE—

(See Pleading, 4.)

1. Clerical Misprision.—Where the facts from which a title by descent is derived are correctly stated in the pleadings, the pleader's erroneous conclusion as to the legal effect of the facts, carried into a judgment is a judicial error and not a clerical misprision. *King, &c., v. Middleborough Town & Lands Co., &c.* ..... 73

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Mistake—Municipal Corporations.

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**MISTAKE—Continued.**

2. Agreed Judgment—This court will not hold a party to an agreed judgment where the agreement was entered into under a mistake as to the legal effect of admitted facts. *Idem.* ..... 73

**MORTGAGES—**

(See Corporations, 1, 2.)

**MUNICIPAL CORPORATIONS—**

(See Constitutional Law, 1; Negligence, 2.)

1. Cities of Fourth Class—Stock Ordinance.—An ordinance making it unlawful to allow live stock to run at large in a city of the fourth class and providing for a sale of such stock on actual or constructive notice to the owner, is within the police power conferred by section 3490, sub-section 31, of the Kentucky Statutes, providing that such municipalities shall have power to "make proper regulations for the impounding, keeping stock, fixing fees for same and release of same and regulate and prohibit the running at large, &c." *Armstrong v. Brown, &c.*... 81
2. Cities of the First Class—Street Improvement.—An ordinance for the construction of a carriage way on Highland Avenue in the city of Louisville providing that said carriage way should be thirty feet in width and should be improved by grading, curbing and paving with vitrified pavement or block pavement with corner stones at the intersection of streets and alleys, and foot-way crossings across all intersecting streets and alleys, in accordance with the designs and dimensions shown upon the drawings on file in the office of the Board of Public Works and as designed in the ordinance entitled "An ordinance concerning the improvement of streets with vitrified brick or block pavement," and at the cost of the owners of ground in a defined boundary upon Highland Avenue, the cost to be equally apportioned among the owners of property according to the number of square feet of ground owned by the parties respectively within the defined boundary, is not invalid, either, first, in attempting to charge the whole cost of the work, including the carriage-way and curbing, to a defined tax district by the square foot, or, second, in failing to make any provision for the additional charge of twenty-five per cent. against corner lots. *Gleason, &c., v. Barnett, &c.* .....125
3. Same.—An allegation in the petition for the enforcement of a street assessment that the ordinance for same was passed on the recommendation of the Board of Public Works is conclusive in the absence of any denial that the Board of Public Works recommended the passage of the ordinance. *Idem.* .....125

## Municipal Corporations.

## MUNICIPAL CORPORATIONS—Continued.

4. Same.—If the ordinances for the construction of Highland Avenue were defective for either of the causes set out in paragraph one herein, the defect could be remedied by the chancellor by the express provisions of section 2834, Kentucky Statutes. *Idem.* 125
5. Same.—The dismissal of the action against the property owners on demurrer was not a decision of the case upon its merits, and the judgment against the city was premature. *Idem.* .....125
6. Cities of Fourth Class—Street Improvements.—An ordinance for reconstructing side-walks, which provides that the improvement shall be "constructed by putting in five-inch stone curbing in pieces not less than two feet long and two feet wide, the side-walk to be ten feet wide, exclusive of curbing, to be made of granitoid," is sufficiently specific. *Hackworth v. Louisville Artificial Stone Co.* .....234
7. Same.—Cities of the fourth class have power to have side-walks constructed and reconstructed at the expense of the abutting lot owner. *Idem.* .....234
8. Life Tenant and Remainderman.—The cost of the reconstruction of a worn-out side-walk is not to be apportioned between a tenant by the courtesy and the remainderman, but the entire cost is to be borne by the former. *Idem.* .....234
9. Damage by Change of Grade.—The evidence fails to show any change of grade and resulting damage to the lot owner. *Idem.* 234
10. Recovery of Money Illegally Collected for Liquor License.—The appellant municipalities having been transferred by the circuit court from the sixth class to the fifth, collected of each of the appellees a liquor license of \$1,000. The act under which the transfer was made having been adjudged invalid the appellees sued to recover the difference between the maximum license authorized by cities of the sixth class (\$500) and the amount paid. It is held by the court that plaintiffs are not entitled to recover. The payment was made to a *de facto* city of the fifth class and appellees are estopped to deny the validity of the organization. *Town of Providence, &c., v. Shackelford, &c.* .....378
11. Liability for Franchise Tax on Waterworks.—A municipality owning waterworks and selling water generally to the public may, under the statutes, be required to pay a franchise tax. *City of Newport, &c., v. Commonwealth* .....434
12. Cities of Second Class—Board of Education.—In the absence of express legislative authority, the Board of Education of a city of the second class has no authority to enact a by-law providing that it shall require a two-thirds majority to elect a clerk of

## Municipal Corporations.

## MUNICIPAL CORPORATIONS—Continued.

- that board. Such a by-law is violative both of the common and statute law of the State. *Heyker v. McLaughlin, &c.* .....509
13. Taxation.—Since the adoption of the new Constitution all property within the territorial limits of a municipal corporation is subject to taxation regardless of the question of benefits actual or presumed. *Hughes v. Carl, &c.* .....533
14. Street Improvements—Enforcement Where Installments Not All Due.—Section 694, sub-section 3, of the Civil Code, which provides that no sale shall be made of indivisible property until all the liens thereon mature, is not applicable to street assessments properly imposed and payable in annual installments. *District of Clifton, Campbell County, v. Schneider, &c.*.....605
15. Telephone Franchise.—Prior to the adoption of the present Constitution the city of Russellville had no legislative power to grant the right to use the streets for the erection of telephone poles and the stringing of wires. *E. Tenn. Tel. Co., &c., v. City of Russellville* .....667
16. Estimate of Time Between First and Second Passage of Ordinance.—Where the first passage of the ordinance was on March 17, and the second passage was on March 31, two weeks had elapsed between the first and second passage within the meaning of the charter. *City of Louisville v. Selvage, &c.* .....730
17. Gross Inequality.—It seems that where gross inequality in the assessment of street improvements results from the fact that one side of the street is divided into squares by principal streets and the other side not; such inequality is sufficient to invalidate the assessment. *City of Louisville v. Selvage, &c.* ..730
18. Pleading.—An amended petition filed to correct an erroneous statement in the original petition that the territory on one side of an improved street was not divided into squares by principal streets to the effect that the territory on the north side of the improved street contiguous to the improvement was a square bounded on all sides by principal streets, on the north by Victoria Place, which latter street was described as parallel to and a given distance north of an improved street, is fatally defective in failing to allege that Victoria Place was a street at the time of the passage of the ordinance. *Idem.* .....730
19. Apportionment Warrants Including Prospective Repairs.—It is not a fatal objection to apportionment warrants that they include prospective repairs and the costs of foot-ways not properly chargeable as under the charter of cities of the first class, the court has power to grant the assessment to include only the amounts properly chargeable. *Idem.* .....730
20. Prayer of General Relief.—Although the petition did not pray

## Municipal Corporations—Negligence.

## MUNICIPAL CORPORATIONS—Continued.

specifically for such amount as might be found due under the apportionment warrants as reformed, such relief might be granted by the court under the prayer for all general relief.

- Idem.* ..... 730
21. Costs and Interest.—Neither the city nor the property holder is liable for costs or interest until the apportionment is corrected.
- Idem.* ..... 730

## NAVIGABLE STREAMS—

1. A stream is a navigable one if it is ordinarily subject to periodical fluctuations attributable to natural causes and recurring naturally, and if its periods of high water and navigable capacity usually continue a sufficient time to make it useful as a highway. *Murray v. A. & L. M. Preston* ..... 561
2. Same—Constitutional Law.—Unless a stream is navigable in fact, the Legislature may not, by declaring it so, deprive the riparian owner of his right to construct water gates and other obstructions without compensation. *Idem.* ..... 561

## NEGLECT—

1. Question of Fact.—It is a question of fact for the jury whether it is negligence on the part of an engineer running a train along the street of a populous city not to be constantly on the look-out for persons coming on the track; but the failure of the fireman or flagman so to be on the look-out is not negligence. *Louisville & Nashville R. R. Co. v. Creighton, &c.* ..... 42
2. Exposed Pond.—A municipality is not liable for damages caused by the death of a child seven years old who entered into a pond in pursuit of a bird and was thus drowned. *Schauf's Admr. v. City of Paducah* ..... 228
3. Peremptory Instruction.—In this action for injury resulting in death as the evidence showed that the engine furnished by defendant to plaintiff's intestate was totally unfit for use, while the evidence of his knowledge of that fact was conflicting, the court properly refused a peremptory instruction. *Chesapeake & Ohio Ry. Co. v. Judd's Admr.* ..... 364
4. Duty of Engineer to Anticipate Danger to Brakeman.—When an engineer is backing his train for the purpose of having a coupling made, it is his duty to look out for danger in his rear and watch the movement of the brakeman and use reasonable care and diligence in ascertaining any danger to which the latter may be subjected, and if he fails to do so and the brakeman loses his life by reason of such failure, the company is liable. *Louisville & Nashville R. R. Co. v. Adams' Admr.* ..... 857



## Negligence—Personal Representatives.

## NEGLIGENCE—Continued.

5. Contributory Negligence—Instruction.—The court in such an action properly instructed the jury that although they might believe from the evidence that the engineer was grossly negligent in backing his train at an unusual rate of speed, yet they should find for the defendant if they believe from the evidence that the deceased was ordinarily negligent, either, (1) in undertaking to make a coupling, or (2) in standing with one foot between the rails, and that such position was a want of ordinary prudence on his part, or (3) in attempting to make the coupling at a time when the cars were in motion, knowing the same to be more than ordinarily dangerous, or (4) that for the purpose of making the coupling the deceased entered between the cars from the left side of said train when such entry was a want of ordinary prudence. *Idem.* .....857

## PARTIES—

(See Rescission, 6.)

## PATENTS—

(See Ejectment.)

## PERJURY—

- Criminal Law.—On the trial of an indictment for perjury alleged to have been committed by the defendant in asserting his innocence upon a previous trial for a misdemeanor, his acquittal on the former trial is conclusive against the falsity of such testimony. *Cooper v. Com.* .....909

## PERSONAL REPRESENTATIVES—

1. Powers to Compromise.—Before a compromise entered into by a personal representative of claims against his decedent will be enforced by a court of equity, it must appear either (1) that the compromise was authorized in advance by the court, or (2) the nature of the claim must be so definitely alleged that the court can determine that the effected compromise was beneficial to the estate, and a proper one for the personal representative to make in the exercise of a reasonable discretion for the protection of the interests committed to him. *Pullins' Admr. v. Smith* ..418
2. Same—Pleading.—A pleading asserting such a claim is defective if it fails to allege with particularity the time and terms of such alleged compromise. *Idem.* .....418
3. Waiver of Demand.—A personal representative may waive the demand required by section 3872 of the Kentucky Statutes; and the filing by him of a general demurrer to the petition against

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 Personal Representatives—Pleading.
 

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## PERSONAL REPRESENTATIVES—Continued.

- him for a claim against his decedent is a waiver of such demand. *Stix, &c., v. Eversole's Admr.* .....516
4. **Executors—Power of, Prior to Probate.**—An executory contract for the sale of land in Kentucky entered into by executors who had qualified in Virginia, but who had not caused the will under which they acted to be probated in this State, nor qualified under the statute in this State, is not void by reason of such failure but may be ratified and become binding by a subsequent probate and qualification in this State and a tender of deeds pursuant to such contract. *Allison, &c., v. Cocke's Exr., &c.*...762

## PLEADING—

(See Administrators, 2; Evidence, 1; Practice, 4; Municipal Corporations, 3, 18, 19, 20.)

1. **Action to Foreclose Lien—Description of Property.**—It is a sufficient description of property against which a lien is sought to be enforced to allege that it is "known and designated upon the map of town lots of the Middlesborough Town Co., recorded in the office of the clerk of the Bell County Court as lot No. 7, in block No. 407, section northeast." *Ryan v. Middlesborough Town Lands Co.* .....181
2. **Answer—Fraud.**—An answer which avers that the contract sued on and its sale to defendant were procured by fraud, covin and misrepresentation, is good without stating the facts constituting the fraud, covin or misrepresentation. *Idem.* .....181
3. **Petition in Action to Enforce Mortgage.**—In an action to enforce a mortgage debt, the petition must state specifically the promise to pay on the part of the defendant, an acceptance of the mortgage on the part of the plaintiff, and the failure on the part of the defendant to pay the mortgage debt. A petition which lacks these substantive averments is fatally defective. *Creech, &c., v. Abner, &c.* .....239
4. **Amending Petition to Include a New Defendant.**—The city of Newport having made a report for franchise tax in the name of the Newport Waterworks, an action against the Newport Waterworks was properly amended to make the city of Newport a substitute defendant. *City of Newport, &c., v. Com.* .....434
5. **Departure.**—A demurrer to the amended answer attempting to set up a written release of the damages incurred in defendant's employment in consideration of \$208, and that in consequence of said release the contract sued on was without consideration was properly sustained. The amendment did not meet the issues tendered by the petition. *Yellow Poplar Lumber Co. v. Rule.* 455

## Practice—Process.

## PRACTICE—

1. Disregarding Rules.—A rule of court that no business shall be transacted "either at common law or in equity" at the December term, may be modified by the court and an order in a civil case at that term is not error. *Monarch v. Brey* .....688
2. Same—Entry of Judgment *nunc pro tunc*.—A record may be amended to include a judgment by default on an entry in the minute book as follows:

"Brey

"12,435 v. Judgt.

Thomas." *Idem.* .....688

3. Misprision.—Notice is not necessary for the entry of a judgment *nunc pro tunc*. Failure to enter the judgment originally is not a misprision under section 519 of the Civil Code for which notice is necessary. *Idem.* .....688
4. Amended Petition—Considering all Pleadings on Demurrer.—After a special plea of *non est factum* has been interposed to a renewal note by parties who deny having received any of the proceeds of the note and who aver that their names have been signed by the principal without written authority, the plaintiff may by an amended petition declare on the original note and to such amended petition a general plea of payment will not be good. On a demurrer to such plea the court will examine the entire proceedings and will infer that the defendant intended that the old note was paid by the renewal. *Bright v. First National Bank, &c.* .....702

## PRESUMPTION—

(See Common Law, 1; Conflict of Laws.)

## PRINCIPAL AND AGENT—

Sub-Agent.—An agent whose power is limited to the collection of rents, payment of taxes and the taking of bids and the submission of them to the principal has no power to create a sub-agent for the purpose of effecting a sale of the property, and such sub-agent can not recover from the principal commission for making the sale. *Jones v. Brand* .....410

## PROCESS—

Service on Insurance Commissioner Upon Indictment Against Insurance Company.—A summons upon indictment against an insurance company may properly be served upon the insurance commissioner by virtue of section 631 of the Kentucky Statutes. *Aetna Ins. Co. v. Com.* .....864

## Public Policy—Rescission.

## PUBLIC POLICY.—

(See Contracts, 7.)

RECORDS, AMENDING *NUNC PRO TUNC*—

(See Practice, 2.)

*RES ADJUDICATA*—

- 1 A judgment dismissing an action for board is no bar to a subsequent action between the same parties for services rendered the defendant for nursing and having washing done for her, the former action requiring an express contract under the statute, and the latter an implied contract only. *Schuster v. White's Admr.* .....317
2. Taxation.—An adjudication upon a liability for taxes for one year is no bar to an action for taxes for a subsequent year, it not appearing that the adjudication resulted from a contract exempting the defendant. *City of Newport, &c., v. Com.* .....434
3. A personal judgment for the amount of the note secured by mortgage in an action to foreclose a mortgage lien is a bar to a subsequent action for a sale of the property to enforce the collection of the judgment. *Gatewood v. Long, &c.,* .....721

## RESCISSION—

(See Contracts, 12.)

1. Fraud as Ground of.—In order to establish fraud against which equity will relieve, it must appear that the misrepresentation was a material fact (as distinguished from opinion), at the time or previously existing (and not a mere promise for the future): must be relied upon by the person whose action is intended to be influenced, and must be made with knowledge of its falsity, or under circumstances which did not justify a belief of its truth. Tested by this rule the defendant failed to make out a case of fraud entitling him to a rescission of his contract of purchase. (*Livermore v. Middlesborough Town Lands Co.*, page 140 herein.) *Jones v. Middlesborough Town Lands Co.* ....194
2. Fraud of Remote Vendor.—A vendee of lands, when sued for unpaid purchase money, can not rely for a rescission upon the fraud of a remote vendor, but is limited to fraud of his immediate vendors or their agents. *Jones v. Middlesborough Town Lands Co., &c.* .....194
3. Failure of Consideration.—A conveyance in consideration of the support of the wife of the grantor will be rescinded at the instance of the heirs of the grantor and the beneficiary after the death of the grantor for failure on the part of the grantee to comply with the agreement. *Lane v. Lane* .....530

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 Rescission—Secretary of State.
 

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**RESCISSION—Continued.**

4. Parties.—In such an action the heirs of the grantor are proper parties. *Idem.* ..... 530

**REVENUE AND TAXATION—**

(See Municipal Corporations, 13.)

**Revenue and Taxation—Franchise Tax—Special Privilege.**—The power to sell, or permit to be sold, on its grounds pools on any and all races that may be run or trotted thereon is a "special and exclusive privilege or franchise not allowed by law to natural persons," within the meaning of section 4077 of the Kentucky Statutes, and subjects the corporation owning it to the payment of a franchise tax. *Latonia Agricultural and Stock Assn. v. Donnelly, Tax Collector, &c.* ..... 325

**REVIVOR—**

An action under section 4 of the Kentucky Statutes is not an assault within the meaning of section 10. The gravamen of the action is the injury to the widow and children and the action may be revived by them after the defendant's death against his personal representatives. *Morehead's Admr. v. Bittner, &c.* ..... 523

**SALES—**

**Judicial Sales—Under Erroneous Judgment.**—A purchaser of land from a defendant in an action in which the land is attached as a provisional remedy, takes title subject to the attachment lien. Upon his death, this title descends to his heirs, and the plaintiff in the action having acquired title to the land to satisfy a judgment claim which was ultimately determined to be invalid, the heirs of the purchaser from the defendant are entitled to a cancellation of the commissioner's deed to the plaintiff and to the recovery of the net profits. *Spicer, &c., v. Seale.* 246

**SCHOOLS—**

**Common Schools—Graded Schools—Power of County Court Under Section 4464, Kentucky Statutes.**—The county court has no power by virtue of section 4464 of the Kentucky Statutes to submit to an election the question of establishing a graded school in a district embracing a city of the fourth class and contiguous outlying territory. *Bailey, &c., v. Figely* ..... 724

**SECRETARY OF STATE—**

**Compensation.**—Under the act of April 6, 1893, entitled "An act concerning the Secretary of State," which provided that after the

## Secretary of State—Statutes, Kentucky.

## SECRETARY OF STATE—Continued.

first Monday in January, 1896, the Secretary of State should "receive an annual salary of three thousand dollars—and no fees or perquisites," the compensation of one thousand dollars allowed him by section 272 of an act of April 5, 1893, entitled "An act providing for the creation and regulation of private corporations," as amended by the act of July 1, 1893, was abolished; and after the first Monday of January, 1896, he was entitled to the sum of three thousand dollars and no more. *Finley, Secretary of State v. Stone, Auditor* ..... 85

## SHERIFFS—

Settlements—Conclusiveness of.—A settlement made by a sheriff for revenue pursuant to the provisions of section 4146 of Kentucky Statutes is conclusive in the absence of any appeal and in the absence of any plea of fraud. *Pulaski County v. Watson, Sheriff* ..... 50

## SPIRITUOUS LIQUOR—

Sale of Intoxicating Liquors—Jamaica Ginger.—(a) Proof that Jamaica ginger contains ninety-six per cent. alcohol and four per cent. ginger is sufficient to show that it is an intoxicating and spirituous liquor; but (b) it is a matter of common knowledge and needs no proof that it is an intoxicating and spirituous liquor. *Mitchell v. Com.* ..... 60

## STATUTES, PARTICULAR; CONSTRUED—

## Constitution, Kentucky.

Section 142	.....	50
Section 163	.....	66
Section 174	.....	20
Section 218	.....	7
Sections 231, 59	.....	7

## STATUTES, KENTUCKY—

Sections 4, 10	.....	52
Section 93	.....	86
Section 631	.....	86
Section 860	.....	83
Section 883	.....	57
Section 1702	.....	25
Section 1932	.....	90
Section 2243	.....	3
Section 2554	.....	12
Section 2834	.....	12

## Statutes.

## STATUTES, KENTUCKY—Continued.

Section 3490 .....	81
Section 3725 .....	707
Section 3872 .....	516
Section 3915 .....	862
Section 4077 .....	325
Sections 4115, 4119, 4120, 4121, 4123, 4128 .....	518
Section 4146 .....	500
Section 4171 .....	329
Section 4464 .....	724
Section 4768 .....	7

## CIVIL CODE—

Section 71 .....	386
Section 519 .....	688
Section 694, sub-sec. 3 .....	605

## ACTS—

Act of February 26, 1863, County Court of Campbell County.....	517
Act of March 8, 1878, exempting Newport Waterworks from Taxation .....	434
Act of April 6, 1888, establishing Board of Commissioners of Jefferson County .....	615
Act of May 2, 1888, Parole Law .....	819
Act of April 22, 1890, relating to county treasurer of Pulaski county .....	628
Act of October 17, 1892, establishing Board of Commissioners of Jefferson County .....	615
Act of April 6, 1893, Secretary of State .....	854
Act of July 1, 1893, Secretary of State .....	854
Act of March 16, 1894, assignments for benefit of creditors .....	1
Act of March 17, 1896, Turnpike .....	608
Act of March 14, 1898, Appeals .....	311

## STATUTES—

(See Taxation, 4.)

Construction of.—The act of March 16, 1894, regulating assignments for the benefit of creditors was properly held by the court below applicable to assignments made before the passage of the act, it appearing that it was the intention of the Legislature to apply the procedure to assignments theretofore made as well as those thereafter to be made. *McNamara, Assignee, &c., v. Schwanger* .....

Section 93 of the Kentucky Statutes, providing for a confirmation of the assignee's report of settlement at the second term of

## Statutes—Taxation.

## STATUTES—Continued.

the county court after the same has been made, is not self-enforcing. An order of confirmation is necessary before such report of settlement stands confirmed. Until such order is made the report stands open for exceptions upon showing cause or reasonable excuse for failing to accept before the second term. *Idem.* ..... 1

3. Repeal of—Special Act Relating to Claims Against Pulaski County.—The act of April 22, 1890, requiring the county treasurer of Pulaski county to pay county warrants in the numerical order in which they were presented, was repealed by the act embodied in the Kentucky Statutes relating to the administration of county finances. *Cooper v. Wait, Treasurer* ..... 628
4. Repeal.—The parole law of May 2, 1888, was not repealed by the act of 1898, creating a prison board, but the powers conferred and the duties imposed by the former act yet rest with the Commissioners of the Sinking Fund. *George, &c., v. Lilliard, War-den* ..... 819

## STREET IMPROVEMENTS—

(See Municipal Corporations, 2, 6, 7, 14, 17.)

## SUPERSEDEAS—

(See Bond, 1, 2.)

## SURETIES—

(See Limitation, 1.)

Liability Where Principal Succeeds Himself.—Sureties of a Treasurer who succeeds himself are liable for a deficit occurring during the term for which they were sureties in the absence of a showing that the treasurer actually turned over to himself as his successor the apparent balance in his hands. *Wood, &c., v. Friendship Lodge, &c.* ..... 424

## TAXATION—

(See Corporations, 6; Municipal Corporations, 11, 13.)

1. Action for Taxes.—Under section 4171 of the Kentucky Statutes an action may be maintained for franchise taxes payable directly into the State treasury. *Central Ry. & Bridge Co. v. Com.* ... 329
2. Same—Penalty.—In the absence of any claim of error in the assessment, or tender of taxes due on an assessment which had been reduced on the appellant's motion, the lower court did not err in rendering judgment for the statutory penalty. *Idem.* .... 329
3. Taxation of Tangible Property.—On the tangible property constituting the waterworks plant, the municipality is liable for



## Taxation.

## TAXATION—Continued.

- taxation as a private corporation would be. *City of Newport, &c., v. Com.* .....434
4. Exemption Act—Repeal of.—The act of March 8, 1878, exempting the Newport Waterworks from taxation as long as it should be unproductive was repealed by the Constitution. *Idem.* ...434
5. The appellee was entitled to credit for the taxes paid by him upon the land during the time he was in possession. *Turner v. Johnson* .....460
6. Power of Campbell County Court to Appoint Supervisors at Newport Session.—Under the act of February 26, 1863, providing for holding sessions of the county court of Campbell county at Newport the county court so held could transact any business of which that court had jurisdiction except that no court of claims could be held at Newport. Accordingly the order of the county court held at Newport, November 21, 1898, appointing supervisors was valid. *Mossett, &c., v. Newport & Cincinnati Bridge Co.* ....518
7. Same—Number of Supervisors.—The county of Campbell containing a city of the second class and two cities of the fourth class, the county court properly appointed twelve supervisors under the provisions of section 4115 of the Kentucky Statutes. *Idem.* .....518
8. Same—Time of the Meeting of the Board of Supervisors.—The provisions of section 4119, Kentucky Statutes, requiring the board of supervisors to convene at the county seat of their respective counties on the first Monday in January of each year is directory. If as a matter of fact they did on that day meet at another place, and proceeded to discharge their duties as supervisors, such irregularity would not render any assessment made by them invalid. *Idem.* .....518
9. Same—Powers of the Board.—Although sections 4120, 4121, Kentucky statutes, provide that the board of supervisors shall not continue in session for more than fifteen days, and might during this period increase or decrease any list if the evidence be clear and unmistakable that the valuation is not a fair cash value, yet the law does not forbid them upon reconvening to hear complaints from taking up any matter which may have escaped their attention during the first meeting. By section 4123 it is provided that the board in re-assembling shall hear all complaints and pass upon the assessment of all tax-payers and for that purpose remain in session for not more than ten days. The action of the board in raising the assessment of appellee during its adjournment of the session was not therefore invalid. *Idem.* .....518

## Taxation—Verdict.

## TAXATION—Continued.

10. Same—Irrregularity.—By section 4128, Kentucky Statutes, no irregularity in the execution of the duties of the supervisors renders the assessment invalid. Any aggrieved taxpayer may appeal to the judge of the county court within ten days after the final adjournment of the board and this remedy is exclusive. *Idem.* .....518

## TRUST FUNDS—

- Same—A trustee who, in carrying out the provisions of his trust, deposits the trust funds in a bank with an agreement that he is to receive interest on same, becomes merely a creditor of the bank when the trust funds become commingled with the general funds of the bank, and if the bank then makes an assignment, the trustee is not entitled to payment as a preferred creditor, *New Farmers Bank's Trustee v. Cockrell, Rec'r.* .....578

## USURY—

1. Building and Loan Associations.—The interest charged by a building and loan association to its borrowing members is usury if in excess of six per cent.; and any act authorizing such associations to charge in excess of that amount is unconstitutional. *The Safety Bldg. & L. Co. v. Ecklar* .....115
2. Loan Through Broker.—A loan of money at seven per cent., the lender receiving six per cent., and the broker through whom the loan was effected receiving one per cent., was usurious and rendered the lender liable for the excess. In such case it is held that the broker was agent for the lender. *Payne v. Henderson* .....135

## VENUE—

(See Contracts, 13, 14.)

- Jurisdiction—Actions Against Insurance Companies.—Under section 71 of the Civil Code, providing that actions against insurance companies arising out of transactions with an agent may be brought in the county in which such transaction took place, an action may be maintained against an insurance company having its principal office in New York upon an adjustment of a loss made by its agent in this State in the county where such adjustment took place, although the policy was issued to a citizen of West Virginia in that State upon property located there. *Mutual Fire Ins. Co. v. Hammond* .....386

## VERDICT—

(See Criminal Law, 15.)

## Warehouse Receipts—Writ of Prohibition.

## WAREHOUSE RECEIPTS—

- A warehouse receipt issued by a manufacturing corporation for articles recited to be in its warehouse, and used by it in its ordinary course of business, can not be held to create a valid lien under section 4768 of the Kentucky Statutes. *Bell & Coggeshall Co. The, v. Kentucky Glass Works Co., &c.* ..... 7

## WILLS—

1. Construction of—Contribution.—A widow who takes under her husband's will takes as any other devisee and is liable to contribution to pay the debts of the estate in proportion to the value of the realty and personalty devised and bequeathed to her. *Atchison, Exr., &c., v. Atchison, &c.* .....190
2. Same.—There is nothing in the will construed in this case to indicate an intention on the part of the testator that the widow should be exempt from the burden of contribution for the payment of his (testator's) debts. *Idem.* .....190
3. Revocation.—A will is revoked where the testator causes his name and those of the attesting witnesses to be cut from it with the intent to revoke it; and the retention of the mutilated instrument with alterations in the testator's handwriting does not revive it. *Saunders's Admr. v. Babbitt, &c.* .....646

## WRIT OF PROHIBITION—

- A writ of prohibition will not lie from the circuit court to a court of a justice of the peace to prevent the latter from giving an erroneous construction to a statute where the amount involved is within the jurisdiction of the justice's court. *Scott v. Tully, &c.* .....69

Ex. J. Ab.

431 6